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AMERICANS WITH DISABILITIES ACT OF 1989

HEARINGS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

AND THE

SUBCOMMITTEE ON THE HANDICAPPED

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 933

TO ESTABLISH A CLEAR AND COMPREHENSIVE PROHIBITION OF DISCRIMINATION ON THE BASIS OF DISABILITY

MAY 9, 10, AND 16, AND JUNE 22, 1989

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AMERICANS WITH DISABILITIES ACT OF 1989

TUESDAY, MAY 9, 1989

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:15 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Metzenbaum, Simon, Harkin, Adams, Hatch, Jeffords, and Durenberger.

The Chairman. We will come to order.

Glad to have all of our guests here this morning. There are those who will have to come in and exit, and we appreciate that. We will ask them if they do it, do it as quietly as possible. We have a very full morning of witnesses here. They have important testimony, and we want to give them the maximum opportunity to be able to be heard and to make the record on this legislation. We will ask everyone, to the extent they can, to be seated or find a place to stand. We have got a very full hearing room, and we want to accommodate as many as we can. We want to get started with the hearing.

I will include my statement, which is a more expanded statement, in support of this legislation in the record so that we can move ahead with the witnesses since we are getting a later start.

[The prepared statement of Senator Kennedy appears in the appendix.]

The Chairman. I will recognize the ranking minority member, Senator Hatch.

Senator HATCH. Thank you, Senator Kennedy.

Mr. Chairman, the story of America is one of ever-growing inclusiveness. It is a story of more and more people being drawn into the great American mainstream of increasing numbers of Americans being able to participate in the activities of a free society to the fullest extent of their God-given abilities. Persons with disabilities are writing a wonderful new chapter of this quintessentially American story every day.

I support a comprehensive civil rights bill for persons with disabilities. I favor extending the substantive protections of Section 504 of the Rehabilitation Act of 1973 to employment; to public accommodations as that term is defined in the 1964 Civil Rights Act; to State and local governments, including their public transit activities; and to television broadcasters in the broadcast of videotapes. I have an open mind on the telecommunications relay services section and the coverage of private transportation.

As you know, Mr. Chairman, we have had conversations about disability civil rights legislation, as have our staffs, and I hope that these conversations will continue.

I continue, however, to have serious concerns with the Americans with Disabilities Act, as I understand the form in which it will be introduced today. In terms of its coverage of public accommodations, it sweeps far beyond its parallel provision in Title II of the 1964 Civil Rights Act. It appears to encompass virtually the entire private sector by its definition of "public accommodation," which includes "establishments that are used by the general public as customers, clients, or visitors or that are potential places of employment, and whose operations affect commerce." This includes not only theaters, restaurants, and hotels but also all sales establishments, grocery stores, drug stores, factories and plants in all industries, clothing stores, appliance stores, office buildings, professional services such as dentists, doctors and others, private schools including private religious schools, and much more of the private sector which is not covered by Title II of the 1964 Civil Rights Act. They are swept in under this bill.

Senator HARKIN. Excuse me, Orrin?

Senator HATCH. Yes.

Senator HARKIN. I was just told by some people that they cannot see the interpreter in the back.

Senator HATCH. I am sorry.

Senator HARKIN. If you can move up there, because they could not see the interpreter. I am sorry.

Senator HATCH. That is fine.

Senator HARKIN. If she is here, they can see her. They just could not see the interpreter.

Senator HATCH. I think if she stands near the person who is speaking, that might be helpful. That is wonderful.

They are swept in under this bill even though they receive no Federal aid or Federal contracts. If this provision remains remotely as is, I see no way that this legislation will pass in this particular Congress.

As a matter of fact, I am concerned that the bill does not contain adequate exemptions for small facilities and small entities. For example, there is no exemption in the public accommodations section.

I am also concerned that the requirements of the bill, in a number of places, exceed the requirements of Section 504.

The remedies imposed under this bill in several instances are too harsh and far exceed relief available under parallel civil rights statutes. We need to strike a reasonable balance whenever we extend Government regulations and mandates on the private sector and State and local governments. Again, these relief provisions render the bill unlikely to gain passage, in my opinion.

For example, and this is just one example, a black person discriminatorily turned away from a public accommodation like a bar or hotel can obtain injunctive relief and attorneys fees under Title II, and the Attorney General can obtain injunctive relief only. The relief available to a person with a disability discriminatorily turned away from a bar or hotel or other public accommodation under this bill includes, in a private action, not only injunctive relief, attorneys fees and costs, but actual and even punitive damages. In an

Attorney General action under this bill, relief may include not only injunctive relief, as is available under title II, and attorneys fees and costs, but also monetary damages to aggrieved persons and civil penalties of up to $50,000 for a first offense and up to $100,000 for subsequent offenses. This is not parallel enforcement. It goes way beyond our current civil rights laws.

Relief in the employment context for discrimination on the basis of disability should parallel the relief available under Title VII of the 1964 Civil Rights Act. This bill, however, adds to that relief the remedies and procedures available under 42 U.S.C. 1981. This statute affords all persons "the same right...to make and enforce contracts, to sue, be parties, give evidence...as is enjoyed by white citizens..." It is privately enforced. Thus, under this bill, relief for employment discrimination includes not only up to two years 'back pay, the next available job, and retroactive seniority, as is available under Title VII, but back pay which is not limited to two years, compensatory and punitive damages, and the right to a jury trial available under Section 1981. Once again, this bill unnecessarily exceeds the obvious model, Title VII of the Civil Rights Act.

In light of my concerns about the Americans with Disabilities Act and my strong conviction that Congress should enact a comprehensive bill—and I do have that strong conviction—I may find it necessary to introduce my own bill or join in one offered by another colleague that may parallel these considerations.

Mr. Chairman, I look forward to hearing from witnesses during these hearings on these and other areas of my concern. I intend to keep an open mind. As everyone knows, I have fought very hard the whole time I have been here for individuals with disbilities and have been at the forefront of much of our disability legislation. In fact, I have been on, I think, all of the legislation which has been passed by this committee.

I feel very badly that I cannot support this legislation in its present form. I could list other reasons why I cannot, but I just wanted to list those few reasons here today. If we are going to have disability legislation that will pass and be signed by the President, it seems to me that it should not exceed the currently very broad civil rights statutes that we already have today for everybody else. And if you do that, I think you hurt persons with disabilities throughout this society, and I think in the end will cause more difficulties, and in the end I do not think this bill will pass.

But, in any event, I am interested in it. I am interested in coming up with the appropriate legislation that will resolve all of the problems for persons with disabilities that can be resolved by us as Members of Congress, and I will work very diligently through all these difficulties to help to achieve that. I will certainly be interested in listening to everybody who testified on this bill today and tomorrow and in any other hearings that we might have.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch appears in the appendix.]

The Chairman. Before recognizing the principal sponsor of the legislation, we will have a chance to examine the good Senator's understanding of the enforcement provisions. I think as the Senator knows, as a member of the Judiciary Committee, it is not only the particular titles, but there are other kinds of inter-related civil rights legislation: Title VII and Section 1981. And when you bring those areas of enforcement together, you get the kind of results that we have in this legislation. But we will have a chance to examine that because we have tried, in fashioning the legislation, to parallel the enforcement provisions.

The principal sponsor of the legislation, Senator Harkin.

Senator HARKIN. Thank you very much, Mr. Chairman.

I know Representative Coelho has waited a long time. I know he has to get back to the House. And I know there are others who have been here a long time. I will just submit my statement for the record.

[The prepared statement of Senator Harkin appears in the appendix]

The Chairman. Senator Jeffords?

Senator JEFFORDS. Likewise, I will just submit my statement for the record, Mr. Chairman.

The Chairman. This is unparalleled in the history of this institution. [Laughter.]

[The prepared statement of Senator Jeffords appears in the appendix.]

The Chairman. Senator Metzenbaum? It puts a lot of pressure on the rest of you fellows.

Senator METZENBAUM. I just want to say one word. First, I want to salute Senator Harkin for his leadership in this effort. I think it is tremendous, and I am proud to be a cosponsor of the legislation.

In a somewhat similar vein, I want to say that I am pleased to hear that Senator Hatch supports the concept of this legislation. So often he is so far out wrong with my own legislation. [Laughter.]

Senator HATCH. Only because of the nature of his legislation, of course.

Senator METZENBAUM. In this instance, he is saying that he wants to support the concept, and I hope you, Mr. Chairman, as well as Senator Harkin as the principal author, would move promptly to meet with Senator Hatch and let us see if we cannot move this legislation along early. I think it is a priority for this Congress, and it is something of which all of us could be proud to pass a bill that deals with the disabled. I will be glad to helpful in every way that I can.

The Chairman. Congressman Adams—Senator Adams.

Senator ADAMS. Thank you very much, Mr. Chairman.

I do not blame you for saying that, because as a Congressman I was deeply involved with all of the communities that are here, all the way from TransBus to a number of other items that we had, and also as Secretary of Transportation.

I am very pleased you are holding these hearings. We have been working on this problem for nearly three decades now. I see some improvements in my city. I hope that I will see a lot more before we are finished.

There are some very difficult things to be accomplished, particularly in the transportation area, and I have a lot of lumps on my head to show for it. So I appreciate being here this morning, and I am looking forward to the testimony.

Thank you, Mr. Chairman.

The Chairman. Senator Simon.

Senator SIMON. This is "be kind to Tony Coelho," as we move around here.

Let me just add my own appreciation for his statement at the press conference. Meaning no disrespect to any of my colleagues, I thought it was the most powerful statement of the press conference when you told of your personal experience.

We can do better in this Nation. And my friend, Senator Hatch, this bill this year really has made some accommodations that I think are realistic. For example, you mentioned the transportation area. The bill last year would have required retrofitting of a lot of buses. This bill simply says any new buses that you acquire have to be accessible.

I think this bill this year—and I hope my colleague from Utah will examine it—includes accommodations that make this a very realistic bill but a bill that pushes us forward where we ought to go.

Thank you, Mr. Chairman.

The Chairman. Thank you very much.

We will have Congressman Coelho who will be our first witness.

I want to include in the record at this point—I think it was referenced by Senator Durenberger, and that is the leadership on this issue that was provided by Senator Weicker. I think he had a longstanding commitment not only in this particular legislation, but on the funding programs as a member of the Appropriations Committee in funding the handicap programs. And I think it is really quite appropriate to mention his leadership.

We are delighted to have Congressman Coelho here. He has been a spokesman for the cause of the disabled. He sponsored a series of employment centers for the epileptics across the country. So not only in political leadership and in the policy-making, but also from a very deep, ongoing continuing personal interest, he has great expertise and a very strong commitment. And we thank you for coming over to the Senate. We thank you for the leadership in the House of Representatives in this whole area of the disabled. We look forward to your testimony.

STATEMENT OF HON. TONY COELHO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COELHO. Thank you, Senator Kennedy. I appreciate very much your having these hearings. There is no doubt about your strong leadership over the years and your family in regards to those who are less fortunate, particularly those with disabilities. And we appreciate very, very much that leadership.

Senator Harkin, we appreciate your leading this bill and introduction in the House side, and your staff, Bobby Silverstein in particular, who has done so much to try to help educate all of us as to what is really in this bill and what it does or does not do.

I appreciate very much the comments of everybody else: Senator Simon, my very good friend, and his personal remarks. I appreciate that.

I was glad to see, Brock, that you were referred to as a Congressman. We still call you Congressman over on our side.

Senator Hatch, I just wanted to make a comment about your statements. I thought they were very good. I only wish that you were on board with us right now.

Senator HATCH. I wish I was, too.

Mr. COELHO. You are an acknowledged leader in this area, and I would hope that you would be open and receptive to what is in this legislation, as I know you will. Your history has shown that.

You know the history of this bill. It was basically a direct result of a group put together by Senator Reagan—excuse me. [Laughter.]

Senator HATCH. Now, he might resent that.

Mr. COELHO. He would resent that.

A group put together by President Reagan, and to my surprise they came up with a much stronger bill than we put into this Congress, as you know. As has been pointed out by Senator Simon, it was much tougher in lots of different areas, and we made substantial modifications—so much so that some of my colleagues on the House side think that I have caved in too much. So I want you to recognize that.

Hopefully, as you address the different provisions of this legislation, you will recognize the accommodations that have already been made. I think I speak for most of us in the disability community. We very much want you on board and very much need you support. Hopefully, you will be open-minded in these discussions.

We would prefer that you not introduce your own bill. I am being very direct with you. We would prefer that you work with us to reach accommodation on amendments, and I know Senator Harkin and others would be receptive to having you with us.

If I can just make a few remarks, Mr. Chairman, I would like to include my statement for the record so we can save some time for the rather more important witnesses that you have to hear from.

As I pointed out in my press conference, I did not intend at the end to be so personal, but one of the things I have felt so strongly about over the years is the lack of opportunity that those of us with disabilities have to be able to prove our worth, to be able to prove that we can do things.

I was very blessed in my life. God has been good to me. But a gentleman by the name of Bob Hope gave me an opportunity at a time that I was suicidal and I was down. If Mr. Hope had not welcomed me into his family and treated me like his own, if he had not talked about the fact that I wanted a ministry but I could do the same ministry in the Government, in the Congress, and recommended that I go work for a Member of Congress, I would not be here. I know that a lot of my Republican colleagues probably would have wished that had happened. But Mr. Hope gave me that opportunity. But the thing he did for me more than anything else that anybody had done is that he believed. He had faith. And I had lost it all.

I do not think many people understand the emotion that those of us with disabilities go through. The fact that through no fault of our own we have a disability—for whatever reason, God has given us that—to me it was a blessing. It has made me a stronger, tougher, more caring person that I probably would never have been.

But to be denied an opportunity to be yourself, to be able to do things, is something that a lot of people do not appreciate or understand. And all we are asking for is that opportunity to be productive, to be able to get on a bus, Senator Hatch, and to be able to go to work. We are not looking for welfare. We are not looking for something that other people do not have. We just want an opportunity to be able to live and be able to have an opportunity to work and to be able to go to that job and come back home and to be able to have families and to live like everybody else in this great country. Do not deny us the opportunity to be productive Americans, to be productive citizens. That is all we ask.

We know that there is going to have to be accommodations to give us our basic civil rights. We know that. We understand that. There is a cost involved. But isn't there also a cost involved with us not being able to exercise our rights? There is a tremendous cost to the Government right now in maintaining a lot of us with disabilities, because we do not have our basic rights to go out and be productive. We would rather be productive citizens, but we need your help to do it.

We need your help to make sure we have the opportunities to get to our place of residence and to get to our place of occupation and to make sure that people do not discriminate against us just because we are in a wheelchair or just because we cannot hear or just because we cannot see or just because periodically we may have seizures.

We can be productive, if you will give us that right, give us that opportunity. That is all we ask for, nothing more, but definitely nothing less.

Thank you, Mr. Chairman. I appreciate it.

The Chairman. I do not have any questions.

Senator Hatch?

Senator HATCH. Congressman Coelho, nobody admires you more than I do in this Congress. I have seen you as a very, very effective Member of Congress. I think you have achieved heights here that everybody recognizes, and there is not a thing you have said that I would not do, not one thing.

As a matter of fact, Senator Harkin and I have met for hours on this bill, and we are trying, and I will continue to do so.

Mr. COELHO. And I think you can do it.

Senator HATCH. I hope so.

The Chairman. You can do it, Orrin. You can do it. [Laughter.]

Senator HATCH. I would like to do it. He knows that; I know that; Ted knows it. I have worked too long and hard in this area not to be on a bill that will do all that you are saying. And what I have already agreed to with regard to this bill goes way beyond current law. It is going to cause a lot of people distress, but rightly so, in my opinion.

There are just some things in the bill that I think have to be changed; they have to be fine-tuned. Now, to Senator Harkin's credit, they have changed this bill considerably from what it was in the last Congress, which I think never had a chance of passing. I sometimes think we create such high expectations with some of the language that we put in these bills that it will be almost impossible to pass, or impossible, in my opinion to pass, that sometimes we do a disservice.

Now, I really believe that we can work this out so that it is everything you have asked for here today, and I will work hard to do that. But some of the concerns I am raising are very important concerns. I just do not believe the Federal Government can impose everything on everybody without some reason for doing it, and, I might say, to the disadvantage of an awful lot of society, too. But everything you are talking about I am for. Everything you have said here today I will try to do.

Mr. COELHO. Senator, let me just made one comment on what you said, if the chairman does not mind.

I do not want to disadvantage anybody.

Senator HATCH. I do not either.

Mr. COELHO. That is not what I am about. What I am about is helping people. And if there is a way not to disadvantage people in order to help those with disabilities, I want to do that. And I will be very aggressively involved in that.

But if it comes down to a point that the only way I can get somebody with a disability to a job is to impose a little sacrifice on somebody else, I want you to help me do that.

Senator HATCH. I will.

Mr. COELHO. That is all I am asking for.

Senator HATCH. I will help you to do that, and I have already gone that far. What I have problems with are some of the more stringent aspects that go way beyond current law even with regard to civil rights. And those laws are very, very broad.

Mr. COELHO. We will work with you.

Senator HATCH. Well, if you will, and Senator Harkin will continue to work with me, it may very well be that I will be able to help cosponsor this bill. And I would love nothing better.

Mr. COELHO. Thank you.

Senator HATCH. But in its present form, I cannot, and I think people realize that I am sincere in my approach here because I have been there too many times for the disability community for anybody to think I am not. And I think I am raising issues that are extremely important issues that will, in the end, if they are followed, help the disability community as much as everybody else in our society.

Thank you. I admire you. I admire what you have done and what you have become, and you have my friendship. And I will do everything I can to work with you and Senator Harkin and Senator Kennedy and others, and Senator Durenberger in particular, and Senator Jeffords, to try and resolve these problems.

Mr. COELHO. Thank you, Senator.

Senator HARKIN. If the Senator would just yield on that point, I just want to let everyone know that Senator Hatch has been very open and forthcoming. As he said, we started meeting last December on this. We have had periodic meetings on it, not only at the staff level but also at our personal level. He has made some recommendations which we have already adopted, which I thought were very good, very good suggestions to help form this bill.

There are some things in there which we are continuing to discuss, and I just want you all to know that Senator Hatch and myself will continue these open discussions. I am sure that we will be able to reach a meaningful resolution of those differences.

The Chairman. Senator Jeffords.

Senator JEFFORDS. No questions, Mr. Chairman.

The Chairman. Senator Metzenbaum.

Senator METZENBAUM. No questions.

The Chairman. Senator Durenberger.

Senator DURENBERGER. Just briefly. And, Mr. Chairman, I apologize for being late, but we just started Section 89 down in the Finance Committee. I have got to say there is, unfortunately, a lot more television cameras and all the rest of that sort of thing down in the Finance Committee concentrating on what was an obscure tax provision but also has to do with discrimination.

Tony, I just wanted to say to you that I am glad I got here in time for your sort of personal witness. I guess for all of us who wake up sometimes in the morning wondering, thinking, why do we do this sort of thing—which I know you and I have talked about from time to time—your statement about the ministry becomes very, very important in terms of the kinds of things that make you stay in a tough job.

I thought I should ask you this question because you may be the only politician, so to speak, sitting here today. But those of us who worked very hard on Grove City, I think we were sort of shocked—and I will just talk about my own personal shock. I will not try to be collective about it. But I was shocked when I got back to my State and found in my political party this incredible opposition to what we had done here in Washington on Grove City.

My party, the Republicans—it has been called the Independent Republican Party since Watergate in Minnesota—has sort of become a membership organization for a lot of people who feel strongly about certain personal values.

I can remember the county convention of the largest county in our State, Hennepin County just closed down right after I got through making a speech because everybody, almost two-thirds of the people in the audience, were standing up holding signs "Repeal Grove City." And many of these people are living in some kind of fear that when any of us legislate the rights of persons with disabilities that somehow or other we are going to include in that definition a variety of disabilities or illnesses that have occurred because of certain kinds of sexual behavior, in particular.

And I know you have lived with this yourself—that is, the political side of this—and I just wonder if you would not have something to say to all of us who will have to go back out there fighting for persons with disabilities and meeting up with those folks who, every time we do this, somehow or other see it as an effort to promot certain kinds of sexual behavior.

Mr. COELHO. Senator, I appreciate very much your comments.

The question is: Does somebody with a disability, medical disability of any sort, deserve to be discriminated against? I think the answer is overwhelmingly no.

Now, first off, we are a Nation that believes in whatever God you want to believe in, but we believe in a Supreme Being. And the Supreme Being basically is an individual who, in my mind, is someone who wants the lowest among us and the highest among us to be treated fairly and equally. Those with medical disabilities do not want any favors. They do not want any special treatment. They do not really want anybody to go out of their way to help them. But they also do not want you to go out of your way to stop them or to hurt them. That is all we are asking for.

We are neutral on a lot of issues, but we want other people to be neutral, too. And that is all we are doing by giving us our basic civil rights: We are asking people to be neutral. And when I say neutral, I basically mean let me decide, or let my blind brother or my handicapped sister behind me decide, what we can or cannot do. Don't you decide for me, no matter what my illness is.

If you have some concerns about a particular illness or whatever in some other field, that is your business. But do not discriminate against me because of an illness or a handicap.

Let me tell you one quick story if the chairman does not mind. About 5 months ago, I had a family come to me. The mother was a cook at a high school, and the father was a janitor at the same high school. They had a son who was a teenager who had epilepsy that they did not permit to go to school because they were embarrassed. And they were now embarrassed that they had been embarrassed, and they wanted my help. They did not know how to get out of it.

We put this young man through a high school equivalency test, and they had taught him well. His only problem is that he had become socially handicapped. He did not know how to deal with people. And we have had a tough adjustment for this young man to deal with people.

All I am asking is give us a chance to go out and be with people, deal with people, deal with real life. Those of us who have handicaps, physically disabled in some way, we have to deal with our problem. Nobody else has to. We have to. In everyday life we have to. If others will let us deal with those problems, we can adjust.

Our problem is that people will not let us deal with our problem. They impose different standards on us than they do others. And that is all this bill addresses. It is very simple.

Senator **Durenberger**. Thank you.

The Chairman. Senator Adams.

Senator **Adams**. Thank you, Mr. Chairman.

I just want to welcome Tony Coelho here, and I hope the rest of the family are well.

Mr. **Coelho**. Thank you, Brock.

Senator **Adams**. I support you in your fight. I think there are great difficulties that are faced in society where we have built many barriers without thinking. I hope we will think about them. I know there are great problems, particularly in housing and in transport areas, and I hope that in some way the experience some of us have had can be helpful in making these better and making the community a better place to live by making it accessible to all.

I will never forget the first time we took down the curbs that supposedly were for the handicapped and those in wheelchairs. Those that benefited most were the mothers and the children.

Mr. **Coelho**. That is right.

Senator **Adams**. Let us make it a better society. Thank you very much.

I have no further questions, Mr. Chairman.

The Chairman. Senator Simon.

Senator SIMON. I have no questions. We are very proud of you.

Mr. COELHO. Thank you.

The Chairman. We thank you very much for your appearance. We look forward to working closely with you over in the House, and we are grateful for your appearance here this morning.

Mr. COELHO. Thank you very much, Senator.

[The prepared statement of Mr. Coelho apears in the appendix.]

The Chairman. I had mentioned just before hearing, but I will just say it for the record: We have the series of days of hearings in May, and we have every hope and expectation to mark this legislation up at the end of June before the recess. We have invited the Administration to give us whatever input they have at any time during this period of time. And we are very hopeful and optimistic that we are going to be able to work with the Administration so that we can get action on this legislation in July before we go out for the August recess.

We have stated that we will keep the legislation in the full committee since there is such interest in it by all of the members of the committee and because of its importance. And I have asked Senator Harkin to chair the full committee hearings during the course of this legislation. He has agreed to do so. So I will ask Senator Harkin now to introduce the remaining witnesses.

Senator HARKIN. Mr. Chairman, thank you very much for your kindness in letting me chair these hearings today and the remainder of the hearings that we are going to have prior to markup on this legislation.

Our second witness today after Congressman Coelho—again, I introduced him earlier as someone that has made all of the disabled community, not just those who have hearing and communicative problems, but all of us in American, indeed, proud of him and proud of his leadership, proud of his school. That is Dr. I. King Jordan, the president of Gallaudet University.

Welcome to the committee. Happy to see you again. Please proceed.

STATEMENT OF DR. I. KING JORDAN, PRESIDENT, GALLAUDET UNIVERSITY, WASHINGTON, DC

Dr. JORDAN. Thank you, Mr. Chairman, Senator Kennedy, members of the subcommittee. Thank you very much for the opportunity, the privilege, and the honor to testify today in support of the Americans with Disabilities Act.

I am King Jordan. I am president of Gallaudet University. One hundred twenty-five years ago, almost exactly 125 years ago, President Abraham Lincoln signed an act passed by the Congress that established Gallaudet University, thus enabling deaf people to earn college degrees. During that 125 years, the conditions for deaf and disabled people have improved, but I regret to state that they remain today far short of the American dream.

A little bit more than one year ago, the Gallaudet University protest focused world attention on deaf and other disabled Americans. It instilled in each of us a resolve to see change occur. We disabled Americans know that the time for our civil rights is here. It is long overdue. The time is now, and an Americans with Disabilities Act is a tremendous step in the right direction. For us in the disability community, there is no turning back.

The Deaf President Now movement at Gallaudet gained worldwide attention, captured the hearts of people throughout the Nation, and generated more support than we had anticipated in our wildest dreams. As events unfolded at Gallaudet, the interest in the appointment of a deaf president became far more than just a Gallaudet issue and more than the selection of the presidency itself. Rather, it became a symbol for the opportunity of deaf people to achieve a level of self-actualization that heretofore had been denied to us. For deaf people, the problem was not so much one of segregation, but one of paternalism and communication isolation. We were never told that we had to sit in the back of the bus, but we were told that we could not drive. Such an assertion will never be made of us again, I promise you that.

It is my hope that we can build on this heightened level of sensitivity not only for the benefit of deal people, but for the benefit of all members of disabled and minority groups everywhere. We must take full advantage of this opportunity.

During and following the protest, thousands of Americans sent to me messages. Their messages reflected a shocked American public. They were confused, found it hard to believe that discrimination and patronizing attitudes like this still existed in America. We were touched by their understanding and their support. One message, for example, said that the Gallaudet protest was a "symbol of hope and inspiration to people everywhere." We must convert this "symbol of hope" into action. We cannot let it flicker and die.

I had a very vivid example of that hope several months ago. I was visiting the Rhode Island School for the Deaf. I had the opportunity to speak to 5-year-olds. I sat down in one of their chairs, and they sat down on the floor. And while I was speaking and signing to the children, one little boy stood up, walked around behind me, stood right next to me; and as I continued to speak, he put his elbow on my shoulder. Well, I looked at him and he looked at me, and I continue to speak for about a half an hour. I went on answering questions and talking with kids, and the whole time that little boy stood right there with his elbow on my shoulder. Every once in a while, we would look at each and smile. We really formed an instant bond.

I do not think he knew who I was. He was only five. He did not know what the Deaf President Now movement was. But he knew I was deaf. And he saw all of the attention that was focused on me when I came into his school that I was also important. He sensed that he, too, could be someone important if he wanted. For me, that moment was one of the crowning moments in my first year as president of Gallaudet.

I want that little boy to grow up in an America where he is judged on his ability; as Congressman Coelho said, where he is judged on what he can do. We must stop sending conflicting signals to the disabled youth in America. American makes substantial investments in the education and development of these young people, and then we deny them the opportunity to succeed and graduate into a world that treats them with dignity and respect.

My appointment to the Gallaudet University presidency sends a message to disabled youth everywhere that they, too, can aspire to the heights if they are wiling to work and prepare themselves for what they want to become. I keep reminding students at Gallaudet and around the country that they can do anything.

I have said, "Deaf people can do anything...except hear." The successful Gallaudet protest showed this is true. Deaf people and disabled people now have greater expectations that they can achieve based on their individual ability. But all too often, deaf and disabled people are not given an equal opportunity to show that they are capable.

I want to share with you a conversation I had with a Gallaudet faculty member on the very day that I was named president. After a short press conference, I went back to the university, and I met this young man. He approached me with tears in his eyes. And he said to me, "King, you will never know exactly what this means to me personally." Then he told me a story about his earliest memories of his father. This young man has deaf parents, and he told me about stories when his father would work, hire people, train them, and then watch in disbelief that they were promoted before he was. This happened again and again, and every time the company line was: "Well, you cannot use the telephone"; or "Well, you cannot talk"; or "Well, you will have a hard time communicating with the other staff members of the company." And he spent his career hiring, training and seeing other people promoted ahead of him.

In my travels around the country, other disabled people tell me stories that are very similar. Sometimes employers refuse to consider them because of fear or ignorance. Little attention is given to how a reasonable accommodation could enable them to do the essential functions of any job.

Discrimination occurs in every facet of disabled people's lives. There is not one disabled American alive today who has not experienced some form of discrimination. Of course, this has very serious consequences. It destroys healthy self-concepts, and it slowly erodes the human spirit. Discrimination does not belong in the lives of disabled people.

A civil rights bill for disabled people would give us the tools to combat this discrimination. It would afford us protection minorities have had for more than 25 years. Most important, a bill like this must become law to demonstrate that disabled people, like that five-year-old boy, can have the same aspirations and dreams as other American citizens. Disabled people must know that their dreams can be fulfilled.

I would like to talk for a minute to focus on a section of the ADA which is of extreme significant to the deaf community—that portion of the bill requiring telephone relay services for calls made within and between States. A relay system enables deaf callers who use telecommunication devices for the deaf, or TDD's, to make calls to and receive calls from individuals using voice telephones.

More than a hundred years ago, Alexander Graham Bell invented the telephone in the hope that he could close the communication gap between deaf and hearing people. Not only did the telephone not helped close that gap, but in many ways it widened it and has become one more barrier in the lives of deaf people.

I often receive complaints about the frustrations and inconveniences of not being able to use the telephone, and as a deaf person myself, I know well those frustrations. The simplest task often becomes a major burden when we do not have access to the telephone: the person who wants to call a doctor for an appointment or the person who has to call his boss and tell him he cannot show up for work that day, someone at home who needs to call a plumber to fix a leak, or maybe a theater-goer who wants to make reservations or go to dinner. These are simple tasks, but they are not simple if you cannot use the telephone. What should take two minutes or three minutes often becomes a long trip through the city trying to do the things that would be very easy with the telephone.

I know how important the telephone is. It is so important to me that I have installed a TDD in my car. I cannot imagine a day without having ready access to my car telephone. With my schedule the way it is, I would be lost without this phone. The phone is a necessity, and it is a necessity for all of us, not just people who can hear. Without a relay service, I can call only those other people who have a TDD. That is a limitation that is unsatisfactory to me and unacceptable to deaf people in general.

Last year, I testified on the Telecommunications Accessibility Enhancement Act of 1988. That act set up a relay system within the Federal Government that is operating now. That is a wonderful first step toward our goal of increased telephone access. However, it is just that--a first step. The ADA will complete the task at hand. By requiring nationwide telephone relay service for everyone, it will help deaf people achieve a level of independence in employment and public accommodations that is sought by other parts of the ADA.

I believe very strongly that the Gallaudet protest helped to bring together the entire disabled community. Today, we are witnessing a cohesiveness that has never been so strong. Our success at Gallaudet has given us all a resolve to see this struggle for equal rights through to success. We are confident that we will win and we will win together. Forty-three million Americans will not let this opportunity slip by.

Passage of the Americans with Disabilities Act will tell disabled Americans that they are, indeed, equal to other Americans, and that discrimination toward disabled persons will no longer be tolerated in our country. It will also make a very powerful statement to the world that America is true to its ideals. That is the full measure of the American dream.

Thank you, Mr. Chairman.

Senator **Harkin**. Thank you. That was wonderful testimony.

[Applause.]

Senator **Harkin**. That was wonderful.

Dr. Jordan, of course, you know how proud I am personally—I know that all of us are—of you and of Gallaudet, of what you have accomplished. And I just want you to know that your testimony touches me very deeply.

I just have one question I want you to address yourself to. I had one question about the relay system, but you have covered that in your remarks. I might just for the benefit of the people here recall an instance where we talked on the phone with our TDD's. Dr.

Jordan said that this was the first time he had ever communicated with a Senator on a TDD. And I said, well, that is nothing. This is the first time I have ever communicated with a university president on a TDD, too. So we both had a first.

The question I want you to respond to is this. Some people say that deaf persons who require interpreters or blind persons who require readers should be limited in their job prospects to jobs in the Government or in public agencies, should not have the right to work for private industry because of the costs that are involved. I think we are going to hear a lot of this as we begin to work through this bill, and I just wondered if you had some observations.

Dr. Jordan. My response, sir, to a suggestion like that would be outrage. I will need to control my emotions. To speak about limiting job opportunities to one sector as opposed to opening up opportunities in general flies in the face of everything I said in my testimony and everything I believe in my heart. The whole intent of the ADA, as I understand it, is to provide opportunities for people to show what they can do, and to say or suggest that those opportunities should be limited to the Federal Government is almost outside my comprehension. I would say absolutely not should they be limited.

I can speak to some of the things like the accommodations that would be necessary for deaf people. I believe there is a wide misunderstanding of exactly what that means. Someone said to me, for example, "Why should I hire a $15,000-a-year Xerox clerk and then pay $25,000 a year for an interpreter for that clerk?"

I do not think that in anyone's mind there is the belief that you have to hire two people, that one is the deaf employee and one is an interpreter who will follow him around. I do not function like that. I do not know anyone who functions like that. Often, interpreters can be hired to do other things as well as interpret—administrative secretaries or professional staff, even, who interpret on an only-as-needed basis.

Most of the time, people who are hired who are deaf function without an interpreter except when they are in a meeting or except when they are attending a workshop or except when there is a very essential need for one-to-one communication. But I think it needs to be made clear to people that the accommodations are not nearly as large as some people would lead us to believe.

Senator Harkin. I think that is the important point. I think these accommodations will be just stupendous. In many cases, it is just using good ol 'Yankee ingenuity to think about ways of accommodating this. And we will be discussing this more, I know, as we go through the hearing process.

But I know this issue is going to be raised, and I wanted you to respond to it, and I will be asking other witnesses to respond to it, also.

Dr. Jordan. If I may go further, that $15,000-a-year clerk came during a conversation when the same person told me about how the ADA is trying to make the world flat. And I take issue with that, too. The ADA is not trying to make the world flat. It is trying to make the world just and fair.

Senator Harkin. Again, I am not going to get into personal things here, but I would just say that we have come a long way in the last 40 years or so. As I have told you before, my brother, who is deaf, has been since he has been a little boy, was told when he went to school, the Iowa School for the Deaf, that he could be three things: He could be a cobbler, a printer, or a baker. Those were his choices. If he wanted to be anything else, there was no other opportunity. That was it. So they taught him to be a baker. Well, he never wanted to be a baker, but that was all the choices he had. It led to a life of frustration and missed opportunities. Of course, his productive life is now behind him, but I look at that life and think what could have been, what opportunities could have been, what he could have done had he had those opportunities.

To me, this bill just represents that one final step to take to make sure that others who come along do not have those missed opportunities.

Senator HATCH.

Senator HATCH. Thank you, Senator Harkin.

President Jordan, I am interested, of course, in widening opportunities for persons with hearing impairments in a whole variety of ways, but let me just address one. That is the area of television programming.

What do you think about a provision requiring television stations to broadcast their videotapes with closed captions as soon as is reasonable? And what are your thoughts and advice on this?

Dr. JORDAN. I find it to be a very reasonable requirement, and I find it to be something that would benefit not just deaf people but people who are learning English as a foreign language. Many other people who cannot hear for one reason or another can watch the captions on the television programs. I find through my personal experience that when I became deaf—I do not know if you know, sir, but I grew up a hearing person. I became deaf at age 21. And when I became deaf, I virtually stopped watching television or going to the movies.

There is no visual message that cannot be disambiguated without the use of the auditory message, and without captions, television really become meaningless to me. Now, with captions, I can watch it, and I enjoy it the same way that anyone else can.

I understand that there is an additional expense to captioning television programs, but I do not think it is an unreasonable expense.

Senator HATCH. Well, thank you. We appreciate your testimony here today. It has been very influential and very good.

Dr. JORDAN. Thank you, sir.

Senator HARKIN. Senator Metzenbaum.

Senator METZENBAUM. Dr. Jordan, I find your testimony very interesting, very informative, very helpful. But my response is not to you, it is to the team that is behind you. I think of all the people who watch the basketball games in this country and watch the football games. I do not think any team ever had greater support from the American people than the students at Gallaudet when they were fighting to achieve their objective. I think you ought to tell them that they made all of us who are Americans stand a little bit taller, a little bit prouder. We are happy they won.

Dr. JORDAN. I appreciate that very much, sir. Please believe me, I tell them at every opportunity that the changes that took place at

Gallaudet and the changes that are continuing to take place and the attitudes and awareness about deafness and disability are due in large measure to their efforts. In fact, if I may, I have at least three of those students with me today, the student leaders. And since you recognized them, I would appreciate it very much if we could ask them to stand up and be recognized here. Can I do that?

[Applause.]

Dr. JORDAN. Thank you, sir.

Senator HARKIN. Senator Simon.

Senator SIMON. Thank you very much.

I join Senator Metzenbaum in commending you and the students at Gallaudet. What we face is the wasted lives that Senator Harkin talked about, in part because of barriers we erect in a variety of ways, transportation and other things. In part, there is also the social fear. If I just may usethis example—this seems to be the day for personal experiences.

I wear hearing aids. It was very interesting after I first got my hearing aid that a Member of Congress in his 80's came to me and said, " Did people talk much when you got your hearing aid?" He was afraid of the social stigma of wearing a hearing aid.

We have to get over these barriers so that we do not have wasted lives. And you are a great example of that, and we are very proud of you.

I think also of a man named Henry Kisor, who is the book editor of the Chicago Sun Times. The hundreds of thousands of people who read the Chicago Sun Times have no idea that Henry Kisor is deaf. He is enriching the lives of all of us. And what we are trying to do in this legislation is to say: Let us make sure we enrich the lives of everyone by opening up the doors of opportunity.

We thank you for your leadership and your example. I feel a little bit like that 5-year-old boy who was leaning on your shoulder. I know you are important, and you are an inspiration to me, just like you are to that 5-year-old.

Senator HARKIN. Thank you very much, Senator.

Let me just respond a little bit on the captioning. I was listening to Senator Hatch when he was talking about that. In a couple of weeks, I will be introducing bill, which again I will be asking for cosponsors on, that will mandate the insertion of a chip in every television set that is manufactured—or sold in the United States, because they are manufactured in Japan or other places—a little chip that costs less than $10 that will provide that every television set has a capability of closed captioning. It can be done for less than $10.

Senator HATCH. It may be that it should go in this bill, if we can arrive at a final bill that everybody can support. It would be a good thing. I personally agree that this is something that needs to be done.

Senator HARKIN. I thank you. It is just such a cheap thing. Right now we have real-time captioning for many things. In fact, the House of Representatives has real-time captioning. We are trying to get that in the Senate right now. But we can do it.

Senator HATCH. Why, we may even be able to understand more about what is going on. [Laughter.]

I mean, I tell you, I cannot understand a word Metzenbaum says most of the time.

Senator METZENBAUM. It is just as well. [Laughter.]

Dr. JORDAN. Mr. Senator, when I travel, even if I travel for overnight, I take with me a TDD for telephone calls, a vibrating alarm clock to make sure that I wake up in the morning. And if I need to watch something on CNN, I have to take a small telecaptioner. Some of the larger hotel chains now have the captioned programs on one channel on their cable, but I need one suitcase just for the devices that make life better for me. And the more television programming that is out there, the more willing I will be to carry my decoder with me.

Senator HARKIN. Dr. Jordan, thank you very much.

Senator HATCH. May I say one other thing? I just want to tell you what an inspiration you are to all of us here today and to millions of people around this country. Your testimony is very, very important, and your life is very important. And I appreciate having all these young people with you here today as well.

Dr. JORDAN. Thank you very much, Senator. [Applause.]

Senator HARKIN. Next is another individual who, as I said earlier today, has spent his entire life fighting for the rights of Americans with disabilities, Justin Dart from the Task Force on the Rights and Empowerment of Americans with Disabilities.

I might just add, while Justin is getting adjusted there, that you have also been a great inspiration to many of us for many, many years. Just a tireless fighter, and all of us are very proud of what you have been doing and continue to do, Justin. We are just happy you are here today. Thank you.

STATEMENT OF JUSTIN DART, CHAIRPERSON, TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES, WASHINGTON, DC

Mr. DART. Thank you. Senator, it is a privilege to appear before this distinguished committee at this historic gathering of some of the great American patriots of the 20th century.

My fellow members of the disability community and I applaud your courageous personal leadership for our rights and that of your colleagues and all the members of your staffs.

I represent the Task Force on the Rights and the Empowerment of Americans with Disabilities, and I submit our written report for the record. I address you today not simply as chairperson of the task force, but also a person with a disability, a fiscal conservative, an active Republican, and, above all, an advocate for the principles of individual responsibility, individual productivity, and individual rights which have made America great.

Mr. Chairman, Senator, I speak to you today from the bottom of my heart to say the most important words that I have ever said in my life. It is absolutely imperative for the integrity and for the prosperity of this Nation that the Americans with Disabilities Act become law. During the past year, I have personally presided at 63 public forums, at least one in every State, and have made ADA presentations at numerous other gatherings.

Senator, I am a hardened veteran, a 40-year veteran of the disability movement, but I heard and saw things in those forums that shook me to the very foundation of my being. Thousands of persons with disabilities and their advocates provided overwhelming evidence of massive discrimination and segregation in all aspects of life. And I submit these documents and tapes to you.

There is blatant infringement of personal rights. There is the most extreme unemployment, poverty, psychological abuse, and physical deprivation experienced by any segment of our society. The task force concludes that these problems will never even begin to be solved until this Nation makes a clear, enforceable statement of law that people with disabilities have the same inalienable rights as other people.

The task force has found united disability community support for the Americans with Disabilities Act. Of more than 23,000 persons attending my ADA-related presentations last year, not one single individual expressed opposition to the act. Every major disability constituency organization that I know of supports the passage of ADA in a form that does not compromise the principle of equality, because partial equality is not equality.

However, concerns have been expressed about ADA by sincere, well-meaning persons, generally outside of the mainstream of the disability community, who hold views that I myself once held.

Cost: Is ADA affordable? Equality affordable in America? Would this question be asked about black, Hispanic or Jewish people? The very question reveals an unconscious assumption of inequality. The very question demonstrates most dramatically the absolute necessity for a national mandate of equality. Not since the abolition of slavery has the principle of equality been negotiable for money in the United States of America.

But, yes, there is always the responsibility to implement equality as affordable as possible. ADA is not only affordable, we literally cannot afford not to have it. It is the status quo discrimination and segregation that are unaffordable, that are preventing persons with disabilities from becoming self-reliant, and that are driving us inevitably towards an economic and moral disaster of giant, paternalistic welfare bureaucracy. We are already paying unaffordable and rapidly escalating billions in public and private funds to maintain ever-increasing millions of potentially productive Americans in unjust, unwanted dependency.

As a former CEO of both large and small enterprises employing persons with severe disabilities, I know that the modest expenditures required by ADA, almost all of which fall in the private sector, will constitute the type of investments in productivity that have already proven to be profitable to business and to taxpayers.

The economic and the moral greatness of America is based on providing equal opportunity to wave after wave of previously oppressed and dependent groups. Providing such opportunities to Americans with disabilities will result in yet another period of dynamic growth in the productivity, prosperity, quality of life, and international moral leadership of this Nation.

Senator, a California woman, a mother, a TV director before becoming disabled, speaks for unseen millions when she says, "We can go just so long constantly reaching dead ends. I am broke, degraded, and angry, have attempted suicide three times. I know hundreds. Most of us try, but which way and where can we go? What and who can we be? If I were understood, I would have something to live for."

Senator, distinguished Members of the Congress, Mr. President, give us something to live for. We appeal to you not for more welfare, not for more segregation in nursing homes, but to be recognized as equal human beings, to have equal opportunities to succeed or to fail in the productive mainstream of society. Forty-three million Americans with disabilities respectfully demand full citizenship. We will struggle, united, for however long it takes to achieve that legitimate goal, and we will remember the patriots who stood with us at this historic crossroads.

Mr. Chairman, Senator, we who are associated with the fate of the Americans with Disabilities Act have a profound responsibility to tens of millions in this and in future generations. We are responsible to human beings who exist in the richest Nation in the history of mankind as virtual outcasts from the mainstream of society—jobless, homeless, penniless, and hopeless. We are responsible to thousands who die, who literally die years and decades before their time. We cannot betray these people.

Like our forefathers who founded the Nation, we must reach into the depths of our souls and somehow find the inspiration to rise above the limitations of politics and short-range economic interests. We must unite. We must unite—Republicans, Democrats, conservatives, liberals—to act with responsibility to the foundational values of America and to the future of human beings.

Senator, we have given you thousands of documents, and I do not have to explain to you that no document can express the impact of disability discrimination on a family. I submit to you this brand new empty wheelchair, right there, Senator. On January 24, 1988, last year, my younger brother, Peter, my younger brother, Peter, was faced with the necessity to use, to be identified with this public invitation to discrimination. He said, "I would rather be dead."

Senator, four days later, my brother Peter was dead. The third member of my family to meet this fate in recent years.

Senators, I will do anything, anything, to cooperate with you to prevent my grandchildren and yours from being subjected to the purgatory of subhuman existence which my brother could not face. The Americans with Disabilities Act must be passed. Now is the time for those who believe in the principles of democracy to keep the pledge of liberty and justice for all.

Thank you.

[Applause.]

Senator HARKIN. I do not know if I have the capacity to say anything after that. It was very powerful.

Justin, you and I have known each other for a long time, when you were commissioner of the Rehabilitation Services Administration, working with you then. I have always been proud of you and proud of how you have always stood up there and just always fought for these things. I could not be prouder than I am right now just listening to what you have just said.

You know, we are all politicians here. We have run races. And it is good. Politics ought to be healthy because it sharpens the debate;

it sharpens what we believe in. The open discussion of issues, I think it is healthy. There is Republican, Democrat, conservative, and liberal, and I think that is one of the great blessings of America that we have these open debates and campaigns for public office.

Every once in a while, there comes along something, though, that is just not of a partisan nature. It just does not lend itself to that. It ought to be something that we all pull for. That means we do not have to agree with every jot and tiddle of it, every little thing. We work together to iron out the differences.

You mentioned politics, and I just hope that in this bill that we work out our differences, that it does not in any way become any kind of partisan issue, should not be. This is an American issue. It is an issue for all of us to address. And I think the fact that we have had strong, strong statements made by President Bush—no President of the United States, Republican or Democrat, has ever said the things about disabled Americans that George Bush has said. No President, including the President who was in a wheelchair, Franklin Roosevelt.

So I think this bodes well that everything has come to a focal point in time, that this year we can work together with the Administration, both sides of the aisle here, with the House and the Senate. And because of what you have done for so many years, what you have done traveling all over America, I think we can get it done this year. I really believe we can get it done. I believe we can get it done this year—not next year or 2 years from now, but this year. And we can have a signing ceremony, and we can move ahead. And we can move ahead very aggressively.

I just want to say as one individual that I just want to thank you for your strong statement, but more than that for not giving up. Don't ever give up. We are going to get it done this year.

Senator Hatch.

Senator HATCH. Mr. Dart, as you know, I am a strong supporter of yours, and I am a close friend of your father. I am dedicated to try and get this done this year, too. I think there have to be some changes, but by and large everything you have asked for here I am for.

Now, I just want to tell you that I think your statement has been very, very powerful. Your time has not been wasted in coming here today. We will see what can be done. Actually, we have come very close to having a bill that I think almost everybody can support, and I would like to do that. And I have a lot of respect for what you have gone through.

I had a brother-in-law whom I loved very, very much who contracted both types of polio and became a wheelchair user. To me, he was one of the greatest heroes I have ever known in my life. He was a great athlete but was stricken in his second year of college at Utah State University. In spite of his disability, he went on and got his undergraduate degree and then went on and got a master's degree in electrical engineering. He then worked and supported his family all the days of his life, and he finally gave out one day. It was a very tough thing. I personally carried him through the Los Angeles Temple of my particular church, and there was a bond between us, I think, that was as strong as brothers could have.

So I really do appreciate your testimony here today. I have appreciated your leadership through the years, too. You are a very forceful, dynamic leader, and you mean what you say, and I admire you for it.

I would just make one comment about the cost. I personally think over the long run the Government will save money, and that society will save money and be much better off if we have a broad-based civil rights bill for persons with disabilities. And if we did that, I think over the long run it would be a very good thing for the country, not a bad thing.

I am dedicated to working this out. I just hope we can. And if we can, I think this bill will pass and pass through both Houses of Congress and hopefully be signed by the President.

Thank you for your testimony. I appreciate having you here.

Mr. DART. Thank you.

Senator HARKIN. Senator Metzenbaum.

Senator METZENBAUM. Mr. Dart, I have not met you before. I know you by reputation. What I knew about you before today was not exactly supportive, but I want to say that I think your statement was very powerful. And it is a privilege to be standing shoulder to shoulder with you in attempting to pass this legislation. I am looking forward to working with you. To me, there is only one end result; that is, success, passage of the legislation, signing by the President. We will be working together.

Mr. DART. Thank you.

Senator HARKIN. Senator Durenberger.

Senator DURENBERGER. Mr. Chairman, I regret that in advance I had two commitments which bounced me back and forth so that I was not privileged to hear Mr. Dart's statement. But like everybody here, those of us who do not know him well and those of who do know him well, we have found that special spirit in Mr. Dart is not that unusual. He is the fortunate one to get up here at the table and to be able to articulate it. But that spirit lives in a whole lot of people who cannot ever get to Washington for one reason or other. And so I hope that he knows because of this spirit, and I suppose in part because of his name, and people associate that with a whole lot of things where like a lot of people out here we do not know their names, and that because we do not know their names somehow or other they do not get quite into the glare of the lights. And so Mr. Dart carries a special burden on his shoulders, as well as that special opportunity. I think we are all very grateful that he is willing to shoulder it and to carry it for all of those other people.

Senator HARKIN. Senator Simon.

Senator SIMON. I just want to join in commending you. The one question I have is on the cost question. You said would this question be asked of black, Hispanic, or Jewish people. I am old enough to remember before we passed that Civil Rights Act 25 years ago, and that question was asked. And the people said it would cost too much to pass that Civil Rights Act. It was going to cause disruption in factories and businesses and the schools and everywhere else. And we finally did the right and decent thing. I think we are going to do the right and decent thing again this year, in part because of your leadership. We are very grateful to you.

Thank you, Mr. Chairman.

Senator HARKIN. Mr. Dart, before you leave, Justin, these boxes, what are all these documents that you have delivered?

Mr. DART. Those are the documents submitted to us by individuals with disabilities, probably most of them in their personal handwriting, describing discrimination to which they have been subjected, and articulating their support for the Americans with Disabilities Act.

Senator HARKIN. Were these from some of the public forums that you were having?

Mr. DART. Yes, they are, Senator.

Senator HARKIN. Justin, I want to cover one other area with you. You have been in business a long time. You know what it means to run a business and the costs involved.

Let me read to you a memo from Nancy Fulco from the U.S. Chamber of Commerce Small Business Center. It is to all interested in handicap discrimination legislation. It is dated February 7, 1989, regarding a working group session 2-21-89. Here is the memo.

It says, "In late April 1988, legislation was introduced to prohibit discrimination on the basis of handicap and to require reasonable accommodation in employment, housing, public accommodations, transportation, broadcasting, communications, and in the activities of State and local governments. It is almost certain that identical legislation will be introduced again this year."

"Prohibiting discrimination on the basis of handicap enjoys not only bipartisan support, but also support from President Bush. This adds up to almost certain passage in one form or another. I would like to put together a working group whose goal would be to help fashion the legislation so that it is acceptable to the business community while addressing the needs of the disabled."

She goes on to say that she sets up the first meeting for February 21st, et cetera.

Did you meet with Ms. Fulco?

Mr. DART. I did. I was not able to attend the meeting on February 21st. I believe I met with her personally on February 20th.

Senator HARKIN. And what were her concerns, and what did you discuss? What were the concerns that they raised at that time? Do you remember?

Mr. DART. First, I would like to say that I found Ms. Fulco to be extremely supportive of the rights of American with disabilities, speaking for herself personally. She did say that she felt that her constituency was concerned about the definition of disability in the 1988 act and that they preferred the 504 definition. And also, she said her community was concerned about the description of when a business would and would not be liable to make accommodations, and she referred to the section of the 1988 act in that regard as "the bankruptcy clause," which she felt that the requirement was far too strict. And she recommended going back to certain language which had been in the 504 law.

As I understand it, both of those concerns have been met word for word in the act as it will be introduced today.

Senator HARKIN. As I understand, her concerns were the definition of handicapped was too broad; the deletion of the term "qualified handicapped person;" and the inclusion of bankruptcy clause which provides that reasonable accommodations must be provided by the employer unless it would "threaten the existence of the business."

Mr. DART. Those were the only concerns that she mentioned to me.

Senator HARKIN. And those have all been addressed in this new draft.

Mr. DART. As I understand it, word for word.

Senator HARKIN. Word for word. I just wanted to make that point very clear, that all of those have been accommodated in this new piece of legislation.

Justin, again, thank you very much for being here, for your patience in waiting all this time. Thanks for all of your work.

Mr. DART. Thank you, Senator. It is a privilege.

[The prepared statement of Mr. Dart appears in the appendix.]

Senator HARKIN. Next, we have a panel of three individuals: Ms. Mary DeSapio of New York, Joseph Danowsky of New York, and Amy Dimsdale of Arlington, Texas. If you would all please come to the witness table.

Let me just say for everyone that your testimonies all will be made a part of the record in their entirety. We are going to have to move this along. I am willing to stay. I know we have our respective caucuses today, but I am going to have to try to finish this some time toward 1 o'clock. So if you could all kind of summarize your testimony for us, we would be deeply appreciative.

Let me first then recognize Ms. DeSapio, Ms. Mary DeSapio of New York. Welcome to the subcommittee and please proceed.

STATEMENTS OF MARY DeSAPIO, NEW YORK, NY; JOSEPH F. DANOWSKY, NEW YORK, NY; AND AMY DIMSDALE, ARLINGTON, TX

Ms. DESAPIO. Thank you very much.

I would like to thank you for this opportunity to testify. I am a cancer survivor. During my lifetime, I have never experienced a more difficult and challenging road to recovery. My journey was fraught with a new reality: discrimination. Cancer survivors are discriminated against by the outside world in both the public and in the private sectors. I represent over five million Americans with a history of cancer. My story is not unique. Unfortunately, many cancer survivors have had experiences that are similar to mine.

My background in my business career is extensive and diversified as a financial analyst. I am a member of the Financial Analysts Federation and the New York Society of Security Analysts, as well as many professional societies. My experience has included--I am trying to cut back on this--senior positions with major investment brokerage firms, including Shearson Lehman, Lehman Brothers, and Carl Marks. I have also served as a financial consultant to the Department of Transportation and appeared as an expert witness on its behalf.

I became employed on a full-time basis as vice president in charge of transportation by Josephthal and Company. That was on March 11, 1987. On January 29, 1988, I was diagnosed as having breast cancer. I immediately informed my superiors, and on February 1st I was hospitalized for surgery. My superiors knew that my recovery would take about a month. During my recuperation, I would report daily by phone, even while I was in the hospital, to advise my clients as to market strategy. After I returned home, I often dropped by the office to pick up mail and work on my urgent matters.

One month later, on March 1st, I returned to Josephthal ready to resume my life and my employment on a full-time basis. I scheduled my radiation treatments at the earliest possible time in the morning so that they would not interfere with my daily work schedule. My superiors were aware of my treatment schedule. Immediately upon my return, I was asked to meet with the director of research and the senior vice president. At that meeting, I was told that I was terminated, effective immediately. They told me I was no longer needed.

Josephthal had consistently recognized my expertise, and my job performance rating had been outstanding throughout my employment. Together with all other employees, in January 1988, I had agreed to a ten percent cut in salary in order to ensure my position. The policy was announced to the staff, and I received a confirmation notice on February 19, 1988, along with our paychecks, which included the salary cut. After the October 1987 crash, many Wall Street firms utilized this policy. However, this said that I would have a job. Despite this agreement, they fired me.

I was shocked. It is hard enough to go through the trauma of cancer, but losing my job, I was not ready for that. I was the same person. I had the same skills prior to my surgery. I tried to seek full-time employment with other Wall Street firms, but because Wall Street is a closed community, everyone was aware of the circumstances of my termination. Words cannot describe the emotional and mental distress that I have experienced. I have sustained tremendous economic loss, including lost income, lost benefits, and career loss. Potential employers see me not only as a cancer survivor, but also as a woman who has seen many decades. This makes resuming my career much more difficult.

I feel like I have been unfairly branded for life. Cancer does not discriminate. What happened to me could happen to anyone in any profession at any time. Much to my astonishment, all of my expertise was not an effective shield against discrimination.

I, like millions of my fellow cancer survivors, am not famous like Betty Ford. In order to protect cancer survivors against humiliating experiences like mine, we need a Federal law to prohibit employment discrimination in the private sector. The Americans with Disabilities Act of 1989 will give us an opportunity to fight for equality.

Thank you very much.

[The prepared statement of Ms. DeSapio appears in the appendix.]

Senator HARKIN. It is my intention basically to go through the panel and then ask questions, but let me just ask you this: At the time that this happened, did you ask them why you were being terminated?

Ms. DESAPIO. Yes, I did. The reason that was given was that the firm was too small for an industry specialist. And, of course, my response is that I am a professional financial analyst trained to analyze any corporate document, any industry, and any company.

Senator HARKIN. Was there ever anything said about your cancer, about your operation?

Ms. DESAPIO. No mention was made of the cancer, but they did state that they really did not need—my field was too narrow for their small company. However, I made much money for all of the clients of the firm and continued to make investment decisions for them. And really right after that, many of the brokers would call me for investment advice, and because of the responsibility, I would respond to their queries without pay, without the benefit of pay and all the other accouterments that come with it.

But I really have never been in the position where I have been discriminated against. Even in the professional world, being a woman, it was a difficult thing in the financial field. However, the moment I became a cancer survivor, my entire life changed. It was really very shocking.

Senator HARKIN. I may get back to that. I just wanted to cover that very quickly.

Joseph Danowsky of New York, welcome to the subcommittee. Please proceed.

Mr. DANOWSKY. My name is Joseph Danowsky, and I very much want to thank the committee for the opportunity to speak here today concerning this Americans with Disabilities Act. What I would like to do is tell my story of attempting to find employment over the past few years.

To begin with, I am legally blind. I do not see well enough to read printed material, to recognize faces, to read signs, et cetera. All the work that I have done in terms of going through college and law school I did with the assistance of books from Recording for the Blind and the assistance of readers.

In 1980, I graduated from the University of Pennsylvania with a B.A. degree in economics, and I had received the honor of summa cum laude and became a member of Phi Beta Kappa. At that same time, I received an award from Recording for the Blind, the Scholastic Achievement Award, in recognition of being one of three outstanding blind graduates of 1980.

Subsequent to graduating the University of Pennsylvania, I attended Harvard Law School. When I first began work at Harvard Law School, there were already several blind students in classes above me. In my conversations with them, they made it clear that finding a job, for a blind person to find a job with a private law firm would be a near impossibility. Despite that discouragement, I proceeded in the first year to write over a hundred letters in attempting to find a position with a law firm. In doing so, I indicated on my resume the award I received from Recording for the Blind, not to be confrontational but because I believed if with the potential employer we do not talk about the issue of the disability and the reasonable accommodations, then my feeling is that employer is not necessarily going to consider me or will not consider me for the position unless those discussions really are considered.

In any event, every employer who I applied to in the first year of law school, which was done by mail due to the fact that we really could not use the Harvard placement office for on-campus interviews, through that writing I received one job offer from a very large firm in Pittsburgh. This was a summer position, and the firm supplied me with a reader. Also, at the end of the summer, I received an invitation to return to the firm as a full-time employee.

I want to say up front that the first year of law school is more difficult for everyone to find a summer job, so my experience was difficult, but sighted students had a much less difficult time in finding a summer position that year. Also, I was willing to work anywhere in the United States and did not limit my search to any particular city but was willing to go anywhere where I could get a job.

In the second year at law school, the employment situation is quite different for sighted students. Over 900 employers come to the school, and of all the sighted persons at the school, I did not know of anyone who was not able to obtain a job. In most cases, the average person had numerous job offers in any city in the United States in which those chose to work. For myself, however, and other blind students there, I spent every day from October 1 through the first week in September squeezing in as many interviews as I possible could into my busy class schedule, the effect of which was to obtain two job offers. I accepted a position that year, summer position, with a large firm in Philadelphia where I subsequently received an offer of permanent employment and worked for three years. The firm did provide me with a reading assistant.

Along about 1985, I decided to seek a position with a corporation. I did not want to work for any particular law firms but decided that I felt I would be better suited for a corporate legal department and, therefore, proceeded to apply to corporations throughout the United States. I took three general approaches. One was the normal approach of contacting placement agents, but that soon failed because placement agents did not want to deal with me once they realized I had a visual disability. And I proceeded with the other two tacks of applying to newspaper ads throughout the country and directly writing by name to every general counsel of approximately 600 corporations.

I wrote these letters three times, once in the summer, once in the fall, and once in the late winter. I received about 20 telephone inquiries. Of those inquiries that I did receive, what I determined was that most of those callers did not realize I had a visual disability, that they missed the reference which was centered on my resume in terms of the award I had received as an outstanding blind student. And once they became aware of my disability, many of those companies in their first words inviting me for an interview, subsequently by the end of the conservation had declined the interview or became very uncomfortable about the prospect of meeting with me. As a result of writing these letters, 600 letters three times, I did not receive one job offer.

As you can imagine, I was extremely frustrated. I want to add also that I had references from every employer for which I had worked, and none of these companies ever chose to go back and ask for references, except the current employer for which I am working now.

Being very frustrated about not being able to find a position, especially when I was willing to go anywhere, I decided to write directly to the chief executive officers of every single Fortune 500 company. And I told a story of how I had attempted to find a position but how corporations were reluctant to hire me for various reasons, one being the general perception that I was incapable of doing the work as a blind person, that a lawyer could not do legal work. Another perception I had from this interviewing process was that managers who were in positions of choosing to hire lawyers or responsible persons for corporate positions felt a little bit uneasy about stepping out of the mainstream and putting themselves out on a limb of hiring a handicapped person. Then, of course, the major obstacle was the expense, because in my situation I do need an assistant to work with me in terms of doing legal research and proofreading documents and contracts, et cetera.

The effect of writing to the chief executive officers was that I had received then numerous responses from these corporations telling me that they wanted to see me, they wanted to meet with me, that there were positions available. And just a few weeks previously, the same companies had written to me telling me there were no positions.

I did accept a position with Bear Stearns & Company where I worked as a securities attorney, and I must say, to Bear Stearns 'credit, they were one of the companies of the 600 I did not write to because they had just become a public company and were not in any directories of public companies prior to that year.

I work, as I said, as a securities attorney where I advise brokers and operations personnel about various aspects of securities law. I also negotiate contracts and other corporate matters. In the three years that I have been at the company, I have received consistent raises that indicate that my performance is adequate and that the relationship is a successful one, and the company is pleased with my work.

I feel that if the Americans with Disabilities Act were passed that it would send a strong signal to corporate America that discrimination against handicapped persons is just as wrong as discrimination against any other minority group. Not only that, I feel that throughout the corporate structure, the attitude would be that this is the thing to do, that hiring handicapped persons is not a thing to be avoided. Moreover, I think the reasonable accommodations aspect would cause companies to think: How can we make this work? How can we make the employment relationship work? Not reasons to find as to why the relationship cannot work because of the minimal expenses involved.

Thank you very much.

[The prepared statement of Mr. Danowsky appears in the appendix.]

Senator Harkin. Mr. Danowsky, thank you. Thank you for being here. I think what you just said about the one aspect of the bill that would require employers to make reasonable accommodations would encourage employers to think of and create ways to make an employment relationship with a disabled person succeed, I think that is very important. Perhaps after Ms. Dimsdale testified, I have a poster up here I am going to refer to about some of the ingenious ways that employers have created opportunities. I just think that with this bill it will promote that kind of creative thinking, to promote those opportunities.

Next, let us welcome Amy Dimsdale, of Arlington, TX.

Ms. DIMSDALE. I am here to tell you my story of employment discrimination, which happened not just once but time after time because of my disability.

I graduated 5 years ago from the University of Texas at Arlington with a degree in journalism and have diligently sought employment since my graduation. However, company after company has not even let me in the door, and I have yet to be seriously considered for a job.

All my life I was told I need a college degree to get a job, so I got a degree. Then potential employers told me I needed experience, so I spent several years doing double duty, looking for jobs and also volunteering time to keep my skills current, writing and fundraising for a number of organizations and causes. Tirelessly, I continued applying for jobs, attending job fairs, reading newspaper ads, following every lead, and utilizing every network I could think of.

Over time, a pattern established itself. Employer after employer told me that I have outstanding qualifications, but they found someone better suited for the position. Again and again and again.

After being dismissed without serious scrutiny time after time, it began to dawn on me that maybe it was not something deficient in my skills and experience that caused this treatment. The understanding grew in me that I was not being considered seriously for employment because I use a wheelchair.

I have submitted over 300 resumes and more than 100 applications. I have indicated my willingness to be flexible, work at home, relocate, and use my own special equipment—all to no avail. I need virtually no special accommodations to work, as long as I can get in the building.

Frustrated by my lack of success, I made sure the last group of letters stressed the Targeted Jobs Tax Credit, hoping that companies would seize an opportunity to save money by hiring an energetic, qualified employee. But, again, the response was dismal. I received one reply from 17 tries with the usual lame explanation that I am well qualified and experienced but they found someone better suited for the position.

I earnestly want to work. In preparation for my adulthood, the Government invested considerable resources in me. I could go on listing the benefits that I received. It is an enormous amount of money. Section 504 of the Rehabilitation Act of 1973 was implemented partially so I could go to college at an accessible campus and receive services that gave me an equal shot at gaining an education. But, still, the door of opportunity is closed because of the final, so-far-insurmountable barrier: the attitudes of employers who are under no mandate whatsoever to consider me fairly.

I feel useless, powerless, and demeaned. And I know I am not alone. Most of my friends with handicaps experience the same exhausting process. It is enough to make someone give up and accept lifelong dependency on benefits instead of productive work. I know many educated, capable, and intelligent disabled people who have given up in this way.

Discrimination hurts not only those with disabilities whose potentially productive lives go wasted, but the rest of society as well, because everyone pays the price for economic dependency.

I do want to work, like millions of my fellow disabled Americans want to work. I am not asking for charity. I am asking for opportunity.

Thank you for listening to my story.

[The prepared statement of Ms. Dimsdale appears in the appendix.]

Senator HARKIN. Amy, thank you very much for being here.

Let me just pick on what you said about the money. This chart over here—and I will explain it to you, Mr. Danowsky. There is a pie chart that shows that we are spending about $75.2 billion a year Federal cost for dependency programs for the disabled, $75.2 billion a year. Yet on another chart, it points out that two-thirds of individuals with disabilities, about 12.4 million people between the ages of 16 and 64 are not working at all. Two-thirds of those who are not working would like to do so. That means there are 8.2 million people with disabilities who would like to work. Eighty-two percent of the people with disabilities would give up their Government benefits in favor of a full-time job.

Now, the other chart is about what it costs to employ persons with disabilities. We have many examples we have been collecting over time, some of them simple things.

A timer with an indicator light allowed a medical technician who was deaf to perform the laboratory tests required for the job. Cost: $26.95.

Obtaining a headset for a phone allowed an insurance salesperson with cerebral palsy to write while talking. Cost: $49.95.

A receptionist who was blind was provided with a light probe which allowed her to determine which lines on a telephone were ringing, on hold, or in use at her company. Cost: $45.

Well, I have just got page after page after page. I have got some more here of different ones. Everybody thinks that it is going to cost a lot of money. There are a lot of things, as you said, Mr. Danowsky, which if you just think creatively people can come up with them, if they have got to. Now, if they do not have to, well, then, you get bits and pieces like this. So that is why I am hopeful that, as I say, when this bill passes this year that we will see this kind of good ol 'Yankee ingenuity come forward.

Ms. Dimsdale, are you presently employed right now?

Ms. DIMSDALE. No.

Senator HARKIN. You are from Arlington, Texas, and you are 28 years old, and you have graduated from the University of Texas with a degree in journalism. Have you sought employment outside your State or mostly within Texas?

Ms. DIMSDALE. Mostly in Texas, but California mainly, too.

Senator HARKIN. Who have you worked through? Have you worked through different agencies?

Ms. DIMSDALE. Texas Rehabilitation Commission, and I have many friends in the rehabilitation area, and they have helped me seek employment in California through their networking.

Senator HARKIN. Ms. DeSapio, I was just looking at a Business Week article that had you prominently featured in an ad in there for the Federal Railway Administration, I think, or something like that.

Ms. DeSapio. No. It was the Association of American Railroads.

Senator Harkin. Oh, yes, yes, that was it.

Well, all three of you provided excellent testimony, and all three of you have given different reasons why we need this bill enacted. Again, you have been here this morning, and all I can tell you is we are going to do everything we can to get it through.

I would recognize my friend from Ohio, Senator Metzenbaum.

Senator Metzenbaum. Every time I hear stories of this kind, I am just absolutely overwhelmed at the courage that people such as the three of you have.

Ms. DeSapio, are you back in the work market now? Are you in the economic mainstream?

Ms. DeSapio. I have been really unable to during this market slump and the catastrophic events that have preceded it to find employment, number one because I do have a great deal of experience and you get the question—I am on the other end of the totem pole where I have a great deal of experience and I am 60 years old, so that puts me in the category of: Well, she is already a cancer survivor; she has worked all of her years; she may be very good in making money for the company and for the clients, but maybe she only have five years left, we do not know.

So the cancer discrimination I think has held back a great deal because the firms design their application forms so although they are technically not supposed to ask questions, they design an application so that there is no way you can avoid revealing how old you are, have you been in the hospital recently, have you had a major illness. So all of these forms that you will use to seek admission into a firm, they automatically disqualify you without even reviewing your capabilities and what you can contribute.

I am still capable of making very good market-astute investments. I know market turns. I have a great deal to contribute. And the frustrating part is that the need is there and I have the knowledge, and transferring the mantle of knowledge is being denied me.

Senator Metzenbaum. That upsets me much.

Ms. Dimsdale, how long will you be in town?

Ms. Dimsdale. Until tomorrow.

Senator Metzenbaum. Call my office. You are employable, and I am going to see if I cannot make a few calls to get you a job.

Ms. Dimsdale. Thank you.

[Applause.]

Senator Harkin. And that goes likewise for me. If I can help back it up in any way, let me know.

Senator Metzenbaum. If you get two Senators to put a little clout on it, maybe it will help. You ought to have a job, and maybe some doors have been opened, or could be. We will see if we cannot help.

Senator Harkin. Thank you all very much for being here today.

Senator Harkin. Our next panel of four: Harold Russell, the President's Committee on Employment of People with Disabilities; Zachary Fasman of Paul, Hastings, Janofsky and Walker, representing the Chamber of Commerce; Lawrence Lorber of Kelley, Drye, and Warren, the American Society of Personnel Administrators; and Arlene Mayerson, Disability Rights Education and Defense Fund.

Welcome to the committee. Your statements will be made a part of the record in their entirety. If you could summarize, I would appreciate it, and we will start just in the order I called.

Harold Russell, from the President's Committee on Employment of People with Disabilities, welcome to the committee.

STATEMENTS OF HAROLD RUSSELL, CHAIRMAN, PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES, WASHINGTON, DC; ZACHARY FASMAN, OF PAUL, HASTINGS, JANOFSKY, AND WALKER, WASHINGTON, DC, ON BEHALF OF THE CHAMBER OF COMMERCE; LAWRENCE Z. LORBER, OF KELLEY, DRYE, AND WARREN, WASHINGTON, DC, ON BEHALF OF THE AMERICAN SOCIETY OF PERSONNEL ADMINISTRATION; AND ARLENE B. MAYERSON, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, BERKELEY, CA

Mr. RUSSELL. Thank you, Mr. Chairman.

My name is Harold Russell, and I am chairman of the President's Committee on Employment of People with Disabilities. I was appointed to the committee by President Harry Truman when it was established in 1947, and I have served under every President since then. I have been chairman of the committee for the past 25 years. The mission of the President's committee is promote maximum employment opportunities for people with disabilities.

I am very honored to have this opportunity to address you regarding comprehensive civil rights protections for people with disabilities. The views presented in this statement are my own and not those of the Administration. The Administration has formed a policy working group to deal with this issue. The group is responsible for assessing the extent of discriminatory practices against individuals with disabilities and making recommendations as to how to correct these practices so that individuals can fully participate in our society.

In 1982, Peters and Waterman, in their classic "In Search of Excellence," stated, "Treat people—not capital spending and automation—as the primary source of productivity gains."

In his 1983 book, "The Next American Frontier," Alan Reich said, "We are entering a new era of productivity in which the costs, the process, and the return from investments in human capital all are inescapably social. In the era of human capital..., failing to recognize and to respond with the right mechanisms to supplement the market means stifling the sources of future economic growth."

Only last year, the Hudson Institute's "Workforce 2000" and "Opportunity 2000" concluded that "(B)usinesses will be able to satisfy their labor needs only if they successfully confront...barriers and empower individuals presently outside the economic mainstream to take advantage of meaningful employment opportunities."

Now, while these statements are keys to the future of America's economic vitality, they are axioms for America's response to that portion of its human capital comprised of people with disabilities. In short, we cannot underinvest in people with disabilities. Comprehensive civil rights legislation for persons with disabilities can be an investment blueprint for bringing this human capital to its highest levels of return and ending the waste of our current assets.

Any such blueprint tells us that our investment must be comprehensive. A break, any break in the link that connects individuals with disabilities to the workplace creates a barrier which cannot be bridged. To have less than adequate accessible public transportation services for an individual who is protected from discrimination in employment, or who has received other numerous federally funded services is analogous to throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway.

Our investment must draw upon experience. Mr. Chairman, you and other sponsors of the legislation before you are to be commended for your decision to use the terms "qualified individuals with a disability," to describe those individuals protected from employment discrimination, and "undue hardship" to define limitations on the duty to accommodate. These terms signal an effort to provide employers with a workable and familiar framework for meeting the requirements of the legislation.

Employers have practical experience with providing cost-effective technologies to improve the productivity of all segments of their work force, from clerical pools to assembly lines. Equally, employers have practical experience with cost-effective accommodations for their employees with disabilities. Last year, the Job Accommodation Network, JAN, sponsored by the President's committee, saw a 42-percent increase in its use by employers seeking advice on various aspects of accommodating employees with disabilities. Seventy-two percent of these inquiries resulted in the retention or placement of such workers.

The 1982 "Study of Accommodations Provided to Handicapped Employees by Federal Contractors" reported that "No cost was involved for half of the accommodations reported. An additional 30 percent of the accommodate workers received packages of accommodations for which the total cost was between $1 and $500."

Senator HARKIN. Harold, I wonder if I could you, Senator Metzenbaum and I both have things that we have got to get to. I am trying to get this thing moving along. Could you just sum this up a little bit there? What you have just told are important statistics.

Mr. RUSSELL. Yes, I think I can sum it up this way, Senator, by saying that in all our experience dealing with hundreds of employers and hundreds of qualified applicants, and Federal and State governments, we have found it is good business to provide employment opportunities for qualified people with disabilities. We know this is true, and this is part of the package we have gone through for many years. And this is the story I believe we have to tell. We have to have a comprehensive civil rights bill which will protect the rights of all people with disabilities and ensure that qualified workers have the opportunity for employment.

I am very happy to do this, to be here, because I believe our democracy has to work when all our groups are involved. When 66-and-two thirds are unemployed or 82 percent of black Americans with disabilities are not employed, we need to do something very important.

Personally, I would just like to add a comment, if I may. I appreciate this opportunity more than ever, most of you will know, because I am retiring as chairman after 25 years. And my experience has led me to believe that civil rights is foremost on the agenda for people with disabilities. To all of you who have done and given so much to support the effort for this philosophy, you have my heartfelt thanks. On behalf of myself and millions of Americans with disabilities, I say thank you, thank you, thank you.

Thank you, sir.

[The prepared statement of Mr. Russell appears in the appendix.]

Senator HARKIN. Harold, do not retire before the—when are you retiring?

Mr. RUSSELL. Well, actually, I am waiting now for a replacement, Senator.

Senator METZENBAUM. You will be here at the signing of this bill.

Senator HARKIN. You better be there when this bill is signed.

Mr. RUSSELL. I will be here.

Senator HARKIN. You will be there. With the signing of it this year, the best years of our lives will be ahead of us. Right?

Mr. RUSSELL. Thank you. It will be.

Senator HARKIN. Thanks very much, Harold.

Next, Zachary Fasman.

Mr. FASMAN. Thank you, members of the subcommittee.

My name is Zachary Fasman. I am a partner in the Washington office of the law firm of Paul, Hastings, Janofsky and Walker. My firm is represented on the Labor Relations Committee of the United States Chamber of Commerce, and it is in this capacity that I appear before you today.

I appreciate the opportunity to present the Chamber's views on the Americans with Disabilities Act. I will direct my remarks this morning—and I will try to keep them brief—solely to the employment provisions of the act.

First, let me say that the Chamber shares the goal of the sponsors of this act: that all individuals shall have the opportunity to participate in our society free from discrimination because of disability. Workers with disabilities have shown that their job performance competes with and frequently exceeds that of other workers. We believe that full participation in America's economic life by people with disabilities is essential as we face global competition, and we fully understand the importance of productive employment for the disabled themselves.

While we share these laudable goals, we do not believe this legislation, as currently drafted, is an appropriate or equitable vehicle by which to achieve these goals. Our written statement spells out our thoughts in some detail, and I would like to address only two key issues in my remarks to you this morning.

First, we are troubled because two separate titles of this bill regulate the employment relationship, and those separate titles are by no means congruent. Title I of the act contains broad and general prohibitions that apply to jobs, benefits and opportunities, while Title II contains a specific and straightforward prohibition on employment discrimination. We see no reason for this double prohibition. If Congress wishes to regulate the employment relationship, we suggest that it do so directly and clearly, using existing prohibitions on employment discrimination as a model. The latter point is particularly important, given the vague language in Title I of the bill.

For example, Title I states that it is discriminatory to provide "an individual with a...benefit, job or other opportunity that is less effective than that provided to others." We have no idea what is meant by a "less effective job benefit or opportunity." Neither do we understand what Title I means when it prohibits providing an individual with a benefit, job or opportunity that is different or separate.

These are examples. I could go on, and I have gone on in the written comments that you have before you. In our opinion, this vague language is an invitation to litigation. We suggest that it would be a terrible mistake to empower the Federal courts to inquire into whether a job or benefit is "less effective" than or "different from" another job or benefit, and we see nothing to be gained by applying the vague and general language of Title I to the employment setting.

Instead, we would suggest that references to employment be eliminated from Title I and that Congress concentrate on providing a clear focus and useful prohibition on employment discrimination in Title II of the bill.

Our concerns with Title II of the bill are also significant, and I have outlined those, again, in the written statement you have before you. I would like to address only one issue, and that is an issue that Senator Hatch raised earlier; that is, the fact that the bill allows enforcement both under Title VII and Section 1981 procedures. We believe this is clearly unwise, and we believe it is so because these laws precede from antithetical premises.

Title VII stresses agency involvement, conciliation and voluntary compliance by requiring that an individual file a charge of discrimination and allow the agency to investigate that chart for 180 days prior to filing suit in Federal court. Section 1981, by contrast, allows an individual to go directly into Federal court without involving the agency at all. We are unfamiliar with any Federal statute where Congress both writes in a role for an administrative agency and then says that resort to that agency is unnecessary.

Congress, in our opinion, must choose one enforcement scheme or the other, and we suggest that the Title VII scheme is appropriate for two separate reasons. First, this act's provisions will require substantial interpretation before they achieve concrete form. We believe that involving an administrative agency in the enforcement process will ensure uniform interpretation in contrast to the varied interpretations likely to arise as cases are litigated in various Federal courts around the country. Second, Title VII is aimed directly at employment discrimination, unlike the far broader prescriptions of Section 1981. Title VII embodies the best considered judgment of Congress on how to enforce anti-discrimination laws in the workplace. It is to us the obvious enforcement route.

I would like to thank the committee for its attention. I would also like to pledge my cooperation and the cooperation of the Chamber in trying to achieve a workable piece of legislation that we can fully support.

Senator **Harkin**. Thank you very much, Mr. Fasman.

[The prepared statement of Mr. Fasman appears in the appendix.]

Senator **Harkin**. Next we will turn to Lawrence Lorber, American Society of Personnel Administration.

Mr. **Lorber**. Thank you, Mr. Chairman.

I am Lawrence Lorber, a partner in the Washington office of the law firm of Kelley, Drye and Warren. Previously, I was Deputy Assistant Secretary of Labor and Director of the Office of Federal Contract Compliance Programs in 1975 and 1976. During my tenure at the Department, the OFCCP was officially amalgamated with the addition of the handicapped and veterans functions of Section 503 of the Rehabilitation Act, and Section 2021 of the Vietnam Era Veterans Re-employment Act. It was during my tenure that the initial regulations implement Section 503 were issued by the Department of Labor. Indeed, I testified on those regulations in this room in April of 1976.

Today, I am testifying on behalf of the American Society for Personnel Administration. With over 40,000 individual members, ASPA is the world's largest society dedicated exclusively to excellence in human resources management. ASPA members work for large and small employers which collectively employ more than 41 million people.

ASPA's understanding of the needs of inclusion of the disabled has been a long-standing project of the organization. In 1975, they published a monograph, which I have here, available to all its members entitled "Job Match: A Process for Interviewing and Hiring Qualified Handicapped Individuals." More recently, in December of 1988, ASPA assumed the full expense of providing its 40,000 members with a copy of the fall issue of "Worklife: A Publication on Employment and People With Disabilities," published by the President's committee. ASPA was willing to do so because it shares the goal of the President's committee to make companies aware of the employment potential of people with disabilities.

ASPA has been in the forefront of employers 'efforts to ensure that disabled Americans participate fully in the workplace. We, therefore, applaud the notion of a unified statute establishing one standard to deal with the problem of lingering employment discrimination. However, in reviewing the latest draft of the Americans with Disabilities Act, we are concerned that serious legal and practical employment issues are created which will make effective implementation difficult and create an unnecessary legal quagmire.

I would like to address three points briefly to illustrate some aspects of the bill which we believe will cause an essential problem and, indeed, negate the function of the bill in ensuring employment possibilities and employment opportunities for the disabled.

The bill talks in various sections about the essential function issue or the essential function test, in which employers and the courts would have to recognize and identify the essential function of a job to ensure that the job is structured in a way so that the disabled might be able to perform it. As a practical matter, the personnel profession is simply unable to identify the essential function. We would suggest to the committee that it examine the processes and policies of the Congress, if it were covered by this bill, in its own hiring processes to determine what, indeed, is the essential function of any staffer or of any employee of the Congress so as to segregate those tasks and ensure that reasonable accommodation is made from the ancillary or additive tasks which may or may not be necessary to perform the job.

Second, as Mr. Fasman and Senator Hatch pointed out, the litigation potential of this bill is enormous. I do not believe it would serve the needs of the disabled to have lengthy court battles with experts testifying as to what an essential function is or what a reasonable accommodation is so that individuals might, after years of litigation, achieve their rightful place in the workplace. Rather, an administrative and expedited process would be appropriate and necessary to move the people into the mainstream and stop the wasted resources that this committee has pointed out.

Third, we believe that there is an inherent conflict, unfortunately, between Section 503 of the Rehabilitation Act, which is currently on the books, enforced by the Department of Labor, in this bill. Simply put, in Section 503 reasonable accommodation is an affirmative action obligation to be undertaken by Federal contractors and subcontractors with contracts of at least $2,500 to ensure that their workplaces are open and available to those with disabilities. This act makes the failure to undertake reasonable accommodation a prima facie finding of discrimination, so that an employer who is also a Government contractor, faced with a review and audit by the Labor Department, which might find the reasonable accommodation unsatisfactory—which happens—and which in working with the Labor Department will make necessary changes, will nevertheless find itself found guilty by a Federal agency of a violation of this law.

I believe that that type of situation would inevitably result in employers scaling back their affirmative reasonable accommodation efforts in order to void the whipsawing which will inevitably take place when litigants and their attorneys are faced with the prospect of attorneys fees, punitive damages, and similar problems which this current bill encompasses.

In reviewing these problems and in nothing that the organization I represent, ASPA, is fully in favor of a wide scale universal nondiscrimination law for the disabled, we would simply point this committee's attention to two pieces of legislation—one which is already on the books, one which has been introduced in the House, H.R. 291, by Congressman Moakley, which would have effected an amendment of Title VII, adding the word "handicap" or "disability" to the current prescriptions of Title VII, and which would immediately provide an offer to the handicapped and disabled of our country their full rights and the rights that those other minorities, females and all those of national origin, age, and all the rest, so that they, too, might have immediate access to the courts and to the administrative agencies.

As I indicated, this bill was introduced January 3rd in the House. We believe it is a vehicle that this committee should examine very promptly and hopefully cut through the debate that we are engaged in today so that the rights that we all wish to be delivered to the disabled are delivered promptly without an undue debate and legal challenges and all the rest.

Similarly, or in the alternative, we would direct the committee's attention to Section 503 itself. It was limited in its initial passage to Government contractors. Its requirements, both in terms of affirmative action and non-discrimination, have been on the books since 1974. Most employers in this country are fully cognizant of its requirements. Making that a universal requirement with the current 12-, 13-year history of enforcement, interpretation, would move a long way towards achieving the rapid legislative response to the problems of the disabled, without again going through the mechanisms and the rather difficult problems that we believe are inherent in the current bill before this committee, at least insofar as the employment situation is concerned.

We would urge this committee to undertake this analysis rapidly, and, further, that the members in the organization that I represent, as well as the business community, I believe, would be willing to work very diligently with the committee to ensure the passage of a bill that would meet our concerns and the concerns of the disabled.

Thank you.

Senator HARKIN. Thank you very much, Mr. Lorber.

[The prepared statement of Mr. Lorber appears in the appendix.]

Senator HARKIN. Now, Arlene Mayerson.

Ms. MAYERSON. Thank you, Mr. Chairman. I will try to be brief because I know about the press of time.

In my written testimony, I have wholly documented the many studies which show the widespread discrimination faced by disabled people and the variety of ways in which that discrimination takes place. I do not think anything could be more compelling than the testimony that we heard today from witnesses to convey the human dimension of that discrimination.

Because of the press of time, I would like to turn immediately to the statutory framework of the ADA employment sections. The ADA is modeled after the Section 504 employment regulations. As you know, these regulations took a long time to be developed, had considerable input from the business community and disabled people, and were subject to widespread review. We have over a decade of experience with the 504 employment regulations. The ADA simply adopts the fundamental notions of those regulations.

First, the job applicants must be evaluated fairly to see if they can perform job functions, and that evaluation procedures not be based on stereotypes and generalizations about disabilities.

The second: Fundamental concept of those regulations is that a person with a disability who is able to perform a job with or without reasonable accommodation cannot be discriminated against. That person is qualified for the job.

"Reasonable accommodation" is a term of art from the Section 504 regulations. The ADA also adopts the term of art "unduer hardship." The balance is struck in any given case between the accommodation that is requested for the disabled person and the undue hardship on the employer. The factors to be considered include the size of the employer and the type of operation of the employer.

As you know, there are numerous studies which have shown that accommodations could be made easily and without great expense in most instances.

The ADA also adopts the fundamental concept in the Section 504 regulations that selection procedures must be designed to evaluate ability, as I said. That is Section 202(b)(3). This has been the procedure in Section 501, 503, and 504 for over a decade. Moreover, this type of job-related analysis has been required under Title VII for two decades.

There can be no doubt that a job-relatedness requirement is essential to non-discrimination for disabled people. Criteria which exclude disabled people without being job-related are pervasive. I do not have the time now because of the lateness of the hour to go through all the many examples, but I should say that interviews with employers themselves after 503 clearly demonstrate the need to have job-related requirements.

For example, the Wall Street Journal reported that GTE Sylvania is saying that they changed their attitudes towards more than cancer patients who they completely excluded. We heard from a witness about that. But also the company used to use rigid weight limits on all jobs. And the head of personnel there said, "We have thrown all those out the window. Now we try to fit the job to the person." This is all that is required under the ADA.

Given the indisputable fact that the ADA employment provisions adopted fundamental underpinnings of the Section 504 regulations, I was quite surprised to read last night the testimony of the American Society for Personnel Administrators and the United States Chamber of Commerce. The American Association of Personnel Administrators seems to disapprove of extending the reasonable accommodation and non-discrimination requirements to the private sector. In any case, it is important to not confuse the standards that have developed under Section 504.

The section 504 case law, including Alexander v. Choate, which was referred to by the association, strongly supports what we have done here in the ADA. In fact, the Supreme Court explicitly cited the regulation in the 504 that requires accommodation, reasonable accommodation in employment, cited and endorsed that regulation.

We have ten years of history with these provisions. Essential functions of the job is not such a mystery. I think that the characterization by the American Association is well reflected in the statement on page 7 of their testimony that "actual physical employment criteria such as lifting requirements, strength and agility tests would be subjected to individual review in which the selection criteria would have to be shown to be necessary to the essential function of the job..." This is what they apparently object to.

This is exactly the requirement under Section 503 and Section 504 of the Rehabilitation Act, and it is the linchpin of non-discrimination for disabled people. I am not quite sure, but is the ASPA suggesting that an employer should be able to disqualify a person with a disability who cannot lift 50 pounds for a job that does not require lifting?

I cannot go through every point—and I would love to—and I would be happy to do it in writing. Suffice it to say that the ADA incorporated the fundamental concepts of non-discrimination in the

Section 504 regulations. These standards are not new, they are not confusing, and they are workable. They give due consideration to legitimate business interests of employers. These provisions promote simple justice, the underpinnings of all civil rights laws, the rights to be judged as an individual. As our witnesses have said earlier, there is nothing more American than that.

Thank you.

[The prepared statement of Ms. Mayerson appears in the appendix.]

Senator HARKIN. Thank you very much, Ms. Mayerson.

Obviously, we have a slight disagreement here as to what is happening here. Well, that is what hearings are for and markup sessions, and that is what we are going to try to work out, to see what these disagreements are. I appreciate all your testimony and hope that we can try to clear up a little bit of this, anyway.

Ms. Mayerson, Mr. Fasman, and Mr. Lorber in their testimony suggested that the ADA does not incorporate—and if I am mistaken, you tell me so and I will point to your testimony where I found this—suggested that the ADA does not incorporate the provisions in Section 504 applicable to drug-addicted persons with contagious diseases, and that the ADA is inconsistent with the Drug-Free Workplace Act of 1988.

My intent was to incorporate the policies in Section 504 as interpreted by the Supreme Court and the Justice Department in a recent memo prepared by the Attorney General, which I would like to insert into the record, and make it consistent with the new drug-free workplace legislation.

[The memo referred to appears in the appendix.]

Senator HARKIN. For example, the ADA includes a definition of qualified handicapped person set out in Section 504. Twelve years ago, as you mentioned, then HEW made it clear that under Section 504 employers may still enforce rules prohibiting the possession or use of alcohol or drugs in the workplace. Thus, it is clear to me that ADA also includes this policy.

What is your interpretation of the provisions in the ADA in this regard?

Ms. MAYERSON. The provisions of the ADA, as you stated, are consistent with the 1977 regulations interpreting Section 504, the 1978 amendment to Section 504, and every amendment that has been made since that time which provides that alcoholics and drug abusers are not qualified if they pose a direct threat to the health or safety of others. And I think that would be worthwhile to read from the 1977 regulations interpretation which makes it clear that a recipient can consider past personnel records, absenteeism, disruptive, abusive or danger behavior, violation of rules, and unsatisfactory work performance.

Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees. So our bill is completely consistent and protects any legitimate employer interests.

Senator HARKIN. Mr. Lorber and Mr. Fasman, what is your interpretation of this?

Mr. LORBER. We do not disagree with the 1977 regulations. Our concern is that in Title I the bill would require a causal connection between an employer's action and drug use and alcohol use. If that causal connection is not there, we would support it and believe that the bill with simple language could be amended to ensure that the employer does not have to show a causal connection between an adverse employment act and the use of drugs or alcohol in the workplace. We are just simply concerned that there is a degree of vagueness in a new piece of legislation.

Senator **Harkin**. Does that also apply to section 504, what you just said? That also applies to Section 504?

Mr. **Lorber**. Yes, in some respects, it does.

Senator **Harkin**. So you want us to change 504?

Mr. **Lorber**. No, no, not at all. The section 504 regulations which were cited have been on the books quite a long time, and there is a body of knowledge and body of law interpreting them.

We are simply stating that in a new act to make a clear reference—clear exclusion, if you will, to the requirement that an employer show a causal connection between drug or alcohol use and adverse action to an employee who is found guilty of using that—would allay the fears and make it clear to the courts which will interpret this new legislation what the intent of the Congress was.

Mr. **Fasman**. Senator, if I may?

Senator **Harkin**. Mr. Fasman.

Mr. **Fasman**. The written testimony that you have before you from the Chamber specifically references the treatment of alcoholism and drug addiction in the Rehabilitation Act. And what we have said is the fashion in which the Rehab Act treats this issue is to exclude it from the definition of a handicap entirely. We are not suggesting you change 504, but we are suggesting that the fashion in which you have treated it is different than the fashion in which it is treated under 504. And as Mr. Lorber says, we feel it is very difficult to have a test that requires an employer to prove that the use of alcohol or drugs on the job is somehow inconsistent with performance of the job; whereas, at the same time Congress is about to tell employers, and certainly DOT and various other agencies are telling employers: You must create a drug-free workplace; you cannot employ people who use drugs and alcohol in these jobs. And that is our point; that if you make it more difficult for us by requiring us to show that it is necessary or has an impact on a person's job performance, we cannot do what DOT and the Federal Highway Administration and the Congress apparently are requiring us to do.

Senator **Harkin**. Staff just gave me this; it is a memo from the Department of Justice dated September 27, 1988. It is regarding the application of Section 504 of the Rehab Act to HIV-infected individuals. It says here, "We believe this formulation"—this formulation of Section 504—"leads to a result substantively identical to that reached in the non-employment context; namely, that an HIV-infected individual is only protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others."

So they are saying that basically it is identical. So I do not understand. I still do not understand what you are saying.

Mr. **Lorber**. Well, the HIV issue, of course, is the AIDS issue, and we are not dealing with that. We restricted our comments to drugs and alcohol. And it is simply in that context that we simply believe that legislation can be clarified. The HIV issue is an issue separate and apart from the issues that we were commenting upon. The Drug-Free Workplace Act, the DOD interim regulations, and all that is going on now I do not believe impact on the issue that the Justice Department addressed in its memorandum. It is a somewhat separate issue with its own problems, but not the ones that we are talking about.

Senator HARKIN. How do you think the legislation needs to be changed to address that?

Mr. LORBER. Well, it could be a simple legislative drafting. I do not want to steal Mr. Silverstein's thunder, but a simple legislative drafting simply to provide that an employer cannot—qualification does not include employees who use drug or alcohol in the workplace. A simple statement like that would not deal with the—as I know from my own background, somebody who is an alcoholic is always an alcoholic; an addict is always an addict. If you are cured, if you do not use the substances, you should be able to work. That is not the issue.

The issue is simply what do you do with users, whether they be addicted or not. That is the issue, and I think in that respect a simple drafting probably could deal with that in a lot more——

Senator HARKIN. Do you concur with that, Mr. Fasman?

Mr. FASMAN. I do, Senator, and I think we have even suggested that the way this ought to be treated in the legislation is that these terms ought to be defined as an exclusion from the definition of handicapped rather than a qualification standard. I see that as semantic and a technical change. We have no difficulty with the substance of the provisions, and we are cognizant of our line and the various cases that deal with this.

Senator HARKIN. OK. Well, we will look at that one.

Mr. Lorber, on page 3 of the testimony, you state that the bill in part specifically countermands the interpretations of Section 504 by Choate, and sets aside historical interpretations of Section 504. You give as an example on page 4 the use of the definition of reasonable accommodations found in the bill "is a clear affirmative action requirement looking to creative efforts to ensure access" rather than as a standard to determine whether discrimination has occurred.

As you know, in Footnote 24 of the Choate decision, the Court states that Congress has codified the 504 regulations, which include, among other things, the definition of reasonable accommodations used in the ADA and the requirement to provide reasonable accommodation to applicants and employees. Further, in Footnote 20, the Court makes it crystal clear that reasonable accommodation is fundamental to the concept of discrimination and is not affirmative action.

In your testimony, aren't you kind of countermanding the interpretations of Section 504 and setting aside historical interpretations?

Mr. LORBER. No, Senator. What I believe Choate talks about is whether there is an affirmative action obligation. The bill as drafted equates failure to make reasonable accommodation, which is the affirmative action that we are talking about in the context of the disabled, with the prima facie finding of discrimination. We are simply stating that, as you have pointed out in the materials you have made available today, there are various forms of reasonable accommodation. Just as Mr. Justice Marshall in Choate simply stated that in dealing with the disabled, the requirements of employers are not simply universal since the disability is different in every single case.

What we are simply suggesting is that when you equate nontaking of reasonable accommodation with a prima facie case of discrimination, it is a burden of proof problem, it is a technical problem, but a very real problem if this bill, as drafted, becomes law. Then employers will be put in the position of, almost a position where they cannot simply win. A prima facie finding of discrimination if a disabled person applies for a job and is not given the job, one avenue of exploration will be: Was reasonable accommodation taken?

In an affirmative action context, you do that prospectively. You engage in a constant re-evaluation of your workplace to ensure that it is successful, to ensure that your policies are not limiting. In the case-by-case type of determination which this bill requires, that type of analysis will simply be taken after the fact. The law is clear, if you try to cure a legal wrong after it occurs, the wrong still occurs and there is a remedy owing to the individual. We are not arguing with that.

We are simply stating that in the 504 context, a demarcation, if you will, in our view, at least—and Justice Marshall I believe did that—was simply built into the law. We are saying that the bill, so far as this impacts on employment, that demarcation has been fuzzed, if not simply withdrawn.

Again, we are talking about a drafting, I believe, session or drafting requirement to make it clear if, indeed, this will be the vehicle that you are going to go with, that the affirmative action obligations are prospective obligations. Employers must take those obligations, as we stated in our testimony. One suggestion would be make 503 universally applicable and not restricted to Government contractors. We are not opposed to that. We believe it has a great salutary effect. We are simply stating that in the context of this bill, we are in a position where, in most instances, candidly, employers will not be able to offer any reasonable explanation, any defense. In some instances, there will be a defense.

What we are stating is that when we are dealing in these finite, very difficult issues, the drafting, we believe, should be secure enough so that those concerns will be dealt with, and that we are not going to be dealing with the courts, every district court issuing different interpretations of this requirements, so that it will take years and years and years to get some definitive results. The Supreme Court today, 25 years after Title VII, is issuing landmark decisions interpreting that law, which means that for 25 years there was confusion and uncertainty. We simply do not believe that in the case of the disabled that situation should prevail. Some degree of simplicity and directness in drafting I think would move that a long way.

Senator HARKIN. Ms. Mayerson?

Ms. MAYERSON. I am quite shocked to hear that response, because the reasonable accommodation requirement has been part of the 504 non-discrimination requirement for over a decade. This is not new to the ADA. This is not taking the 503 "affirmative action obligation." This is incorporating what has been the law, has been clear, and has had ten years to develop.

The ADA could not be simpler in stating reasonable accommodation and undue hardship. That is exactly what has been incorporated in 504 for over a decade as part of the non-discrimination provision.

I frankly do not quite understand what it is that Mr. Lorber's response was based on. The United States Supreme Court in Choate, as I mentioned earlier, specifically cites the regulation under 504 that requires reasonable accommodation to qualified handicapped persons. It specifically cites it and endorses it.

This is not new. This has been tried. This has been established, and we have ten years of court cases and ten years of experience with employers on non-discrimination—on reasonable accommodation as part of a non-discrimination provision. The ADA has taken the simplest approach.

Senator HARKIN. Again, Mr. Lorber—and you are getting into some of the fine points here which I am trying to understand here. But it seems to me we have had—Ms. Mayerson said we have had years. I thought it was about 12 years.

Mr. LORBER. Yes. It is longer than that. I mean, 503 regulations were put into effect in 1976. Since I was the person who issued those, I am well aware of the requirements of——

Senator HARKIN. If we have had all this experience with it and it has been——

Mr. LORBER. But the point is—excuse me, Senator—the point is in Section 503—let me address that. One point I think should be made. Section 504 pertains to recipients of Federal grants. The employment section pertains to those provisions of Federal grants in which employment is undertaken under, in effect, Federal purse strings. Section 503 governs employment, its Federal contract, but the nexus between the Federal dollars and the employment, in point of fact, is a lot less. Those recipients of Federal grants—I went through the Labor Department 504 regs, which deals with the JTPA—are extensive. But we are dealing with Federal expenditures. The Federal Government is paying for most of this. It is in the Section 503 context, which I would simply suggest is the applicable and more appropriate context in employment, in private employment that might be looked to. It is in that context, where the Congress specifically created an affirmative action obligation. The Congress in Section 504 simply stated non-discrimination. It may be a semantic difference, but I would simply suggest it is a real one. Affirmative action and non-discrimination, we have had debates upon that. We know that there is a difference. Affirmative action means doing something more. We are not arguing with that. We would urge the committee to address that and perhaps enact it into law.

We are simply stating that that difference, if you will, between what you have to do as an employer prospectively, your constant re-evaluation of your personnel policies, your constant re-evaluation of our physical surroundings of the workplace are a necessary obligation in 1989 of employers. We are not arguing with that. We are simply stating that the 504 model is simply a non-discrimination mode. The terms reasonable accommodation are used interchangeably, but they do have different meanings. We are not opposed to it. We believe it has a salutary effect.

We are simply stating that to make the prospective obligation and non-discrimination findings——

Senator HARKIN. Excuse me. May I just interrupt? Let me just read from the regulations. I do not know how much more clear it can be.

"The reasonable accommodation standard in paragraph 84.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing Section 503 of the Rehabilitation Act of 1973."

Mr. LORBER. It is similar, but——

Senator HARKIN. And it says—wait a second. It says, "Although the wording of the reasonable accommodation provision of the two regulations is not identical, the obligation that the two regulations imposed is the same." So how can you get a different interpretation?

Mr. LORBER. The question is when is one triggered and what is the response to the non-taking of it. That is what we are saying. What is the response? If you do not take affirmative—reasonable accommodation in a 503 review, the Labor Department comes in and says your reasonable accommodation is not sufficient, the employer must do, after whatever the negotiations, undertake the reasonable accommodation, be it physical change, be it personnel policy, all the rest.

This bill is a non-discrimination bill. That obligation, the failure to take that, if you pass the bill, assuming somebody goes into a 1981 litigation immediately, avoids the EEOC. They are going to go to court; they are going to say there was a failure to take reasonable accommodation. That failure will result in immediate significant legal liability to one individual, perhaps, punitive damages, compensatory damages, the full panoply of remedies available in 1981.

What we are simply stating is that if that obligation, the reasonable accommodation obligation becomes what I believe the Congress intended it to be in 1973, an affirmative action obligation, then in that case the employers of this country will know what they have to do, will do it. There is injunctive relief. There is all forms of legal redress for an employer who fails to undertake the steps necessary to achieve compliance with the law. But we will not be put into the position of an individual case-by-case legal battle as to whether or not that failure to take that reasonable accommodation ahead of time resulted in some legal harm to one individual.

This might be a fine point, but in terms of our jurisprudence, it is these fine points which fill up the law books. We are simply asking the committee to try to avoid that trap.

Senator HARKIN. One last thing on this, and then we are going to move on. This is really a fine point. Go ahead.

Ms. **Mayerson**. It is such a fine point. I do not think it is an accurate fine point. I just want to reiterate that the Supreme Court in Alexander v. Choate directly addressed this issue. They said the use of the term "affirmative action" to describe reasonable accommodation has been unfortunate. Let us take this opportunity to say that reasonable accommodation is part of the non-discrimination mandate. This was specifically addressed. So while Mr. Lorber refers to a demarcation that was made, yes, it was made. And the demarcation was made in favor of the interpretation of reasonable accommodation as part of a non-discrimination mandate. There is no inconsistency.

Senator **Harkin**. Well, maybe we just have to look at this, because I was just reading this footnote again, Footnote 20: "Our use of the term affirmative action in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodations. The former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped."

Maybe we have to put that in the legislative history.

Mr. **Lorber**. In effect, that is all we were talking about.

Senator **Harkin**. I thought the case law had settled it. But if the case law has not settled it, by gosh, maybe we will settle it. If you have some suggestions on how we ought to write it, let us know.

Mr. Lorber, again, on page 9 of your testimony, you urge the committee to reconsider the decision to make undue hardship the test for determining the efficacy of the reasonable accommodation because it would be unworkable. Again, since this is the standard included in Section 501, 503 and 504, and has been codified by the Congress in the eyes of the Supreme Court, what you are recommending is that we countermand the interpretation of Section 504 and cast aside these interpretations. Is that what you are suggesting?

Mr. **Lorber**. Again, not at all. If the committee would clarify in the bill what the undue hardship would be, we would look to it. We are aware of a case, Supreme Court case, TWA v. Hardisen in which the term reasonable accommodation, undue hardship was addressed by the Court in the context of religious discrimination. There the Court talks about a de minimis obligation on the part of employers.

The point is that there are several interpretations, and to undertake legislation like this in dealing with standards and obligations, we think it is important that the committee address what has transpired before. We are not talking about new terms.

Senator **Harkin**. All right. Again, in the regulations paragraph 84.12, subparagraph (c), they list it all. In the regulations, it says, "In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of recipient's program, factors to be considered include"—1, 2, 3. They have got the different things listed there.

So what else would you list? What would you suggest other than these?

Mr. **Lorber**. If we are talking about specifying that those, in effect, caveats on what undue hardship entail in the intent of the committee, then I believe we may be moving a long way towards an accommodation, if you will, between our views. If that is, indeed, the intent of the legislation and we are talking about, in effect, the limitations—I will use that term to move it along—of the current 504 interpretations, so that the undue hardship test is understood and does not require, if you will, a significant restructuring in every instance, then the concerns we have expressed have been addressed, and perhaps in clarification in the committee report that will be made absolutely clear.

Senator HARKIN. Mr. Fasman, on page 3 of your written testimony, you state that the term reasonable accommodation is overly broad, unclear and unnecessary. Then you ask the rhetorical question: Does this mean that all employers must provide interpreters or readers for all employees?

Then on page 4, you state that the costs of this action would be enormous and have a disastrous impact on many small businesses.

First, let me say that I am sure you now know that this provision is consistent with the definition in Section 504 regulations which we have been talking about and is consistent with the interpretation of the term reasonable accommodation used under Section 503.

Now, again, my question is: Do you believe—are you mis-stating the application of this provision? I am wondering why you have a problem with that provision. You say it is overly broad, unclear and unnecessary.

Mr. FASMAN. Senator, if I may, I have not jumped in on your comments to Mr. Lorber because I have known him for years, and he is capable of defending them himself and his own positions. But from the Chamber's point of view, let me make one thing quite clear. That is, that we understand reasonable accommodation and undue hardship, and they do not go back just to the handicap act. They go back to religious discrimination under Title VII. This has been the law of the land for many years. That is not the problem.

The problem is not the question of reasonable accommodation and undue hardship and those standards. The problem, as we see it, is the manner in which the term, quote, unquote, "reasonable accommodation" is defined in Title I of the bill. It seems to us that the way it is defined is a mixed metaphor. You have a definition in there that applies and has traditionally applied not only to employment, but to different grant programs, whether or not people can attend classes, what types of classes they should be able to attend, and a whole range of issues that are not addressed to the employment relationship.

We are uncomfortable with applying what I see truly as a mixed metaphor in this broad, vague definition applying to all different programs to the employment setting.

Senator HARKIN. Wait a minute. Can you tell me where else reasonable accommodations apply outside of the employment context?

Mr. FASMAN. I think the reasonable accommodation definitions, at least with which I am familiar under 504, apply to other programs as well, of grantees.

Senator HARKIN. Where? Name one.

Mr. FASMAN. I cannot sitting here right now.

Senator **Harkin**. I am just challenging you. If you can find one, please submit it to the committee.

Mr. **Fasman**. I would be happy to do that.

Senator **Harkin**. Because neither my counsel nor I know of any example. It is a term of art that has consistently been applied only to the workplace. So if there a confusion, if you think there is a mixed metaphor, again I challenge you to find if this has been applied to some instance outside of the workplace.

Mr. **Fasman**. I would be happy not only to do that, but to make these comments——

Senator **Harkin**. We feel it does not. We feel it applies only to the workplace, because that is the way it has been used in the past. And if there has been an interpretation other than that, I would like to know it.

Mr. **Fasman**. All right.

Senator **Harkin**. You said that this may mean all employers. Then you say, "Thus, a small daycare center"—let me see. Let me just read this.

What you are saying is that—you ask this question: "Does this mean all employers must provide interpreters or readers for all employees?" The regulations that accompanied 504 12 years ago says this: "Thus, a small daycare center might not be required to spend more than a nominal sum such as that necessary to equip a telephone for use by a secretary with impaired hearing. But a large school district might be required to make available a teacher's aide to a blind applicant. Further, it might be considered reasonable to require a State welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster care services."

So the regulations have spelled this out, that you do not have to do it for all employers. You asked a rhetorical question, Would this apply to all employers? The regulations are very clear that this would not.

Mr. **Fasman**. Senator, let me say this: The 504 regulations do say, as you have read them. The problem that we have with the bill as it is drafted is that the language of the bill without the interpretive gloss that you have just added, and without a clear statement by the committee as to precisely how far reasonable accommodation goes, will be interpreted, can be interpreted by the courts as requiring just what I have asked; that is, interpreters and readers for every——

Senator **Harkin**. So you want it to be more specific.

Mr. **Fasman**. Of course. And, you see——

Senator **Harkin**. Can I ask you another question?

Mr. **Fasman**. Sure.

Senator **Harkin**. Both of you were endorsing the House bill. The House bill simply provides against discrimination on the basis of handicap, period. There are no standards in that bill. How do you reconcile your support for that bill and what you are telling me here, that you want it to be more specific?

Mr. **Lorber**. Well, because that would be an amendment to Title VII, and there are, as we have stated, 25 years of interpretations of Title VII: interpretation as to job validation, interpretations as to reasonable accommodation. And we would certainly be wiling to live with that. We would urge that.

Senator HARKIN. In other words, you want us to just incorporate this under Title VII. That is what you want.

Mr. LORBER. As we understand it, that is part of what this bill does, anyway.

Senator HARKIN. Ah, but then what you want us to do is to make the application of reasonable accommodation for the disabled a de minimis requirement, which means basically that you are the one that wants to countermand all of the applications to Section 504 that we have had up to now.

Mr. LORBER. No. Again, Senator, we——

Senator HARKIN. Well, let us retrace our steps.

Mr. LORBER. Yes.

Senator HARKIN. You support the House bill which basically says no discrimination on the basis of handicap. I asked you about that, and you said basically yes, because what that would do would be to subsume this bill under Title VII. Right?

Mr. LORBER. That is correct.

Senator HARKIN. So, again, under Title VII, you would assume, I guess, then that the requirement—tell me about the requirement under Title VII for reasonable accommodation, Mr. Lorber.

Mr. LORBER. Well, let me talk about the defenses to allegations of discrimination in Title VII. Since the early 1960's, for example, cost as a defense has been a disfavored defense. There have been expansive readings in the discrimination context as to what Title VII means. Certainly, by 1989, there is no doubt that Title VII is to be viewed as an expansive social legislation. The Supreme Court just said that the other day. We are not arguing with that.

We are talking about in the context of what I would call not the non-discrimination aspects, not the reasonable accommodation, but the extra aspects of it; that the courts have seemed to instruct us all what those terms means in Title VII. If the committee wishes to expand that definition in the context of a Title VII revision, then I suppose it can and should. But we are talking, again, about a very expansive reading of the non-discrimination requirements of Title VII.

In 1989, there could be no doubt that this is to be read as expansively as creative lawyers can do so. We are not arguing with that. We think it is appropriate to do that. But what we are simply stating is that in the context of the Supreme Court decisions lines have been drawn, and we think those lines are appropriate.

Senator HARKIN. Well, it just seems to me that what you are saying is that the requirement for religious accommodations under Title VII, and that is very broad, as you say. That is very broad, the application of Title VII. But what we have done here is to try to tighten it down and make it more specific under Section 504.

Now, you are saying that you want it to be more specific, but on the other hand, you want the House bill, which subsumes under Title VII, which you have just stated, is very broad. Now, what do you want us to do? Do you want us to amend Title VII?

Mr. LORBER. But you do not have the definitional problems and the drafting problems and the problems that we believe are simply inherent in this bill. If that would be done, I think the employer community certainly understands its obligations and would be able to deal with it. As I said, most of the employer community has been living with this for 12 years, anyway, under Section 503. Most employers are now covered by that in any event. Most employers have affirmative action plans to deal with handicapped individuals in any event. We are not dealing today in a tabula rasa situation.

Senator HARKIN. How is ours different than that? How does our change the last 12 years?

Mr. LORBER. What we believe you are doing in this bill is mixing requirements, redefining requirements in a way so as to simply make it an unknown and uncharted course where nobody, we would submit, is going to have a strong indication of what their legal requirements are.

If, in fact, what the committee wants to do is make this law universally applicable in the employment context, and if, in fact, the experiences of the last 12 years in the handicap situations, 25 years under Title VII, our experience is that we wish to replicate, then there are vehicles currently on the law books today which can be transposed to take away the exceptions for Federal grantees or Federal contractors and make that the law of the land.

Our question back, I would suggest, is: If that be the case, then why are we in the process in this bill in the employment context of redefining obligations, of restructuring the legal parameters, of redirecting the burdens of proof so as to reopen this up again. If that is what we want to do, then I, speaking for my own organization, would be willing to work with the committee and do so promptly to structure a bill that would be livable, that would be workable, and hopefully could be passed a lot sooner than the timetable that Senator Kennedy and you have set forth.

Senator HARKIN. It just seems to me—I do not know. I have to look at this more carefully. But it seems like the requirements, I listed all those right there, are exactly what we have in this bill. I do not know. There is something. Maybe I am just not understanding about this. I thought they were identical.

Do you have something that you wanted to say, Ms. Mayerson, about this?

Ms. MAYERSON. Basically to reaffirm your point, that we are not redefining anything, that we are not restructuring anything, that we are not mixing requirements, that we are on a known, charted, successful course. We are taking the fundamental basic concepts of Section 504 and applying it to private employers of 15 or more. It is very, very simple.

Senator HARKIN. That is what I thought we were doing.

Ms. MAYERSON. You can make anything complicated——

Senator HARKIN. No, that is what I thought we were doing. Now, again, if you have got some draft language or something that spells this out more directly, I would like to see it.

Mr. LORBER. We would be glad to provide it.

Ms. MAYERSON. I did just want to make one additional point, because it has come up by both witnesses, about the Hardisen standard. The courts that have looked at that have clearly rejected the very narrow—as you said, de minimis—standard in Hardisen.

Senator HARKIN. Yes. And you are not suggesting that we have the de minimis standard for the handicapped, are you?

Mr. **Lorber**. No.

Senator **Harkin**. No. Okay. Fine. All right. If you have got some suggestions on that, let us see it.

Let me just cover one last thing; again, this may be a problem, the essential functions aspect. On page 5 of your testimony, you discuss the definition of the term "qualified person with a disability" and correctly state that the term means a person who, with or without reasonable accommodation, can perform the essential functions of the job. You then went on to state that the concept of essential functions makes no sense not to be eliminated from the bill.

Twelve years ago, HEW made the following statement about the inclusion of the word "essential." "The term 'essential functions 'does not appear in the corresponding provisions of the Department of Labor Section 504 regulation, and a few commentators objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase 'as useful' in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing a task that bears only a marginal relationship to a particular job."

It is like the old saying they would not hire someone because they could not lift 50 pounds, but that really was not part of their essential job.

"Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition."

So why do you want the words "essential functions" taken out? Again, would that not sort of broaden it to the point that you would not even have to look at essential functions? I mean, what you would say, then, is you could apply this—let us say that a handicapped person's job was answering the phone, but there might be a periodic necessity to pick up a box of papers that came into the office once a week, you know? It is not really an essential part of the job.

Mr. **Lorber**. But in that context, the lifting requirement would fall—to the extent somebody could fashion another challenge, that lifting requirement would not be job-related, and therefore——

Senator **Harkin**. It would not be an essential function of the job.

Mr. **Lorber**. But the point is that the way the bill is drafted in defining reasonable accommodations to the essential functions, we are going to be talking about parsing, as we have stated in our testimony, job descriptions time after time to determine what is essential and what is additive.

When the Labor Department issued the regulations, we addressed, as I recall, the question of whether to put essential functions, and we did not. It was simply in the employment context something that would cause dispute in litigation and really have no purpose. The way the bill is structured in terms of the testing and validation section, if you will, of your bill, I believe employers would be put in an extraordinarily difficult position, if not impossible. It would certainly, I might add, help the membership that I represent, the personnel administrators. They would be rewriting job descriptions and defining what essential functions is morning, noon and night.

Senator HARKIN. But, Mr. Lorber, they have been doing it for 12 years.

Mr. LORBER. Not in a private employment context, and that is the difference. You keep on pointing to 504. What we are simply stating is that for private employers not receiving Federal grants, we are under a different requirement.

Senator HARKIN. Well, wait a second. Obviously, this bill opens up the whole area of private employment. Of course, it does. We are expanding this beyond Federal grantees and Federal contracts. That is the point of it.

Mr. LORBER. That is right.

Senator HARKIN. You are right, the private sector may not have done this, but all those who have got Federal contracts and stuff have had to do that. Right?

Mr. LORBER. Well, I would suggest—and we could do that and perhaps the committee could do it. We could look to the States which have had their own private handicap discrimination laws. There are many of those. We are not bereft of an understanding as to how the laws would apply in the private sector. I do not believe—I would check again, and perhaps the committee staff can as well, for all the private, State non-discrimination laws—Wisconsin, Michigan, New York, and all the others—to see what those interpretations are and what those requirements are. And I believe if you check the State experience where private employers are covered, we will not find the intricacies, the type of problems that we are addressing here.

Now, if there is fault to be found with those experiences, then perhaps we should all learn from them. But we are not bereft of any sort of experience as to the coverage of the private, non-federally supported sector of our economy. To that extent, I believe that adding and interposing these types of requirements which apply to Federal grantees and in the employment context of a Federal grant, where persons were going to be hired with Federal funds, that those problems be addressed.

I am well aware of the fact, going back to the 1970's when President Carter had his jobs program for veterans, the various programs in the 1980's. Employers have not taken the Federal funds attendant with participation in those programs because the requirements, the Federal grant requirements would be too onerous. I do not think that is something that we should repeat today.

So I think if we look to the experiences in the States, we could get relatively rapid agreement as to what should be the appropriate legal standards and obligations for employers.

Senator HARKIN. Did you have something else?

Ms. MAYERSON. I want to take objection with the statement that was just made that the essential function of the job requirement has no purpose. And I think I would like to do that by relating to you two of the clients that I have had where that has been the most important requirement of the law.

Both clients were people with epilepsy. One was applying after working as a group counselor in Juvenile Hall for 10 years as a volunteer because he did not have the nerve to apply because he had epilepsy and had faced so much discrimination; finally did apply, got the highest ratings on the entrance exam; was all set to start work when it was discovered that he did not have a driver's license because of his epilepsy. The driver's license requirement was there because the employer—even though the primary function of the job was to counsel youth in Juvenile Hall, there was a driver's license requirement in case a group counselor would be asked to do an occasional errand. And this man who had volunteers for ten years at Juvenile Hall, who was perfectly capable of working and did not possess a driver's license because he had epilepsy was denied the position even though he could do 99.9 percent of the job, which was counsel youth at Juvenile Hall because he could not jump in a car and do an occasional errand.

We filed a suit on that case, and what happened was we entered a settlement. Afterwards, there were years and years and years of experience where Juvenile Hall itself realized it had been so inflexible in its requirement because it was very, very easy to get another counselor to do that occasional errand and jump in his car. And Clarence Hart was employed, instead of spending the majority of his adult life as he did before that on welfare rolls. The only thing, the most important factor in that case was the requirement of essential function of the job.

I have other cases as well, but because of time, I will stop.

Mr. FASMAN. Senator, if I may respond, we have concepts in the law to deal with that. Undue hardship, pretext for discrimination, these are easy cases. In the religion area, for example, the courts have dealt with cases where, for religious reasons, a mail clerk does not wish to handle draft registration forms. And they have said that an employer is under a duty to accommodate by shifting those duties to another employee. That is a concept that is already in the law.

Again, pretext for discrimination. If an employer comes up with a lifting requirement that says, well, you may have to lift a box of 50 pounds one day a month, perhaps and, therefore, you fail this standard, I think that is fully assimilable under the concept of pretext for discrimination.

Our problem is that when you start talking about essential functions of a job, what you are going to end up with is judges and juries across the country deciding precisely how much of a particular job is useful, how much of a particular job is important for an employer. And that seems to us a significant limitation upon an employer's prerogative to decide how a job can be structured.

Let me also say one other thing, and that is I know that I speak for Larry and I know I speak for both of our organizations in saying that the proposition that tests should measure people for the jobs is not only not anathema but is part of the way American business operates. It is certainly part of the way that my clients operate and Larry's clients operate. We do not have any trouble with that concept at all. The question is how you write it in.

I think, frankly, that some of the difficulty you are seeing here may be born of the fact that Mr. Lorber and I, when we are not testifying in Congress, make our living in the courtrooms of the United States. And my brethren of the plaintiffs 'bar, many of whom I am close to and many of whom are very smart, are quite able and actually—you know, this is their job. They takes the words in the statutes and parse them up and achieve results from courts that perhaps are not in accordance with the manner in which Congress intended the statute.

What we are suggesting, at least what I have suggested in my testimony—and I think it applies to Mr. Lorber as well—is that Congress has an obligation to be very specific in this area, as specific as possible, so that employers know what is expected of them and so that we do not spend another 25 years in the courts trying to figure out, as we have under Title VII, exactly how far we have to go. And we have that history behind us in Title VII, and I think that our position jointly is that we ought to take advantage of that.

We have spent a quarter of a century trying to interpret that law. Why throw that out the window?

Senator HARKIN. Let me just see if I can respond to that. To the extent possible that this legislation can track settled law, settled Supreme Court interpretations, settled regulations, that is what we are going to do. We do not want to go riding off and set up a whole new system and requirements and regulations. We are trying to track what I keep referring to as settled law, settled regulations that have been interpreted by the courts, have been written in regulations.

When I hear someone say, well, we have Title VII, you know, I am still trying to get how specific you want us to be. I mean, we can say, okay, this is what we are following. All legislation—I do not know of any legislation around here that is so specific that it outlines every possible anomaly that might come along. We would go nuts trying to do that. That is why we have regulations. That is why we have Departments of Labor. That is why we have Departments of Health and Human Services—to write the regulations, to help interpret these laws.

We cannot sit here and write every little thing. We are policymakers. We make policy. Now, obviously, we try to do the best job we can of not flagrantly overturning settled law. That is just the opposite of what we are trying to do. What we are trying to do is to track what Section 504 has done, Section 503 has done in the past, what the Supreme Court has said in these cases.

Quite frankly, on the one hand, I am hearing two things. I am hearing "Be more specific"; on the other hand, I am hearing we are too specific. I am not certain of where we are in this balance.

Go ahead.

Mr. FASMAN. All I was going to add was that I am sure that both of us who have seen how the laws have been interpreted in the courts would be happy to try and find the mean. I think that we are not talking about anything significantly different. It is just a question of where you strike it.

Senator HARKIN. I give you my commitment that if you give me some wording that you think better helps us in terms of tracking this legislation, making it consistent with settled law and with settled court opinions, I am more than happy to look at it. Not only more than happy to look at it, but seriously consider and talk with the people on the full committee to see about incorporating it or changing what we have.

As I said today, the legislation that we are introducing today—no legislation ever introduced around here gets through without some changes. Now, we have made a lot of changes in the bill from last year. Quite frankly, I must say to all assembled here today that I have just about reached my point in terms of changing the bill that came out last year. We have made a lot of compromises.

When it gets down to fine points like this, that does not hold. I mean, I am willing to make all kinds of compromises to make sure that we get the drafting correct and everything. But in terms of stepping back more from—and that is not what you are talking about. You are not talking about stepping back from some of the substantive parts of the bill. I do not think we can step back any further than what we have done in the substantive parts.

We will look at some of the drafting areas of it and see what we can come up with, knowing full well as I do as an attorney that—I do not know any two attorneys that would agree on exactly what something means. So I assure you of my good-faith effort to try to incorporate it and try to reach that end.

Having said that, thank you all for your patience, and thank you for your willingness to come up here and to go into the breach, as it is, and give us this stuff and let us look at it and see what we can work out as we go through in the markup sessions.

Mr. FASMAN. Thank you, Senator.

Mr. LORBER. Thank you.

Ms. MAYERSON. Thank you.

Senator HARKIN. Thank you all very much.

The committee will stand adjourned until tomorrow morning at 9:30, same room, where we will continue hearings on the bill.

[Whereupon, at 1:37 p.m., the committee was adjourned, subject to the call of the Chair.]

AMERICANS WITH DISABILITIES ACT OF 1989

WEDNESDAY, MAY 10, 1989

U.S. SENATE,
SUBCOMMITTEE ON THE HANDICAPPED, OF THE COMMITTEE ON
LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:36 a.m., in room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin (chairman of the subcommittee) presiding.

Present: Senators Kennedy, Harkin, Simon, Durenberger, and Jeffords.

Senator HARKIN. The Subcommittee on Handicapped of the Committee on Labor and Human Resources will continue its hearings.

Yesterday the committee heard testimony on the critical need to pass the Americans with Disabilities Act of 1989. The testimony focused in particular on the problem of employment discrimination in the private sector.

Today we will hear testimony on discrimination on the basis of disability in public accommodations and telecommunications.

Twenty-five years after the passage of the Civil Rights Act of 1964, persons with disabilities continue to be denied the right to go to a restaurant, hotel, theater, shopping center, doctor's office or other places of public accommodation.

Further, deaf and hard-of-hearing people, and people with communications disorders, are still being denied the opportunity to use telephones.

No longer can our Nation tolerate the continued building of architectural, transportation and communication barriers that prevent individuals with disabilities from living independent and productive lives in the mainstream of our society.

Like Title II of the 1964 Civil Rights Act, ADA covers hotels, motels, restaurants, cafeterias, theaters, concert halls, and so on. When the 1964 Civil Rights Act was passed, these were the public accommodations which posed discrimination to racial minorities. Like Title II, the ADA focuses on those aspects of society which pose problems of discrimination.

For people with disabilities, these include, in addition to those establishments listed in Title II, others, such as doctors 'offices and public parks. This reflects a realistic approach to the problems faced by disabled persons, as did Title II in the 1964 Act for minorities.

It simply makes no sense to bar discrimination against disabled people by theaters, but not by parks, or by restaurants but not by stores, or by places of entertainment but not in regard to such critical services as dentists' offices and doctors 'offices.

In 1982, the House Committee on Energy and Commerce reported, and I quote: "Hearing people may be unable to fully appreciate the pervasiveness of the telephone both in commercial transactions and in personal contacts. The inability to use this instrument is not only a practical disability but a constant source of dependency and personal frustration."

Telephone service is one of the most important means of participating in modern society. Access to full telephone service would create opportunities and give all persons a fair chance to participate in the mainstream of society.

Without adequate access to telephone service, other rights guaranteed by the ADA or by other laws cannot be full enjoyed or exercised. If a person cannot use a telephone to make hotel or restaurant reservations, or to inquire about job openings, or to contact government officials, then their basic rights as citizens are in a real sense very impaired.

I want to just close my opening remarks today by saying again, as I did yesterday, that usually when you are thanking people for all the help you have been given, you make an omission, and usually the omission you make is one of the most important, and I certainly did that yesterday, for which I am not apologetic.

I want to today recognize and give special thanks to Sandra Parrino and the National Council on Disability for their tireless efforts to educate us about the need for comprehensive civil rights legislation for people with disabilities. As many of you know, they were the authors of the ADA Act of 1988.

I also want to—and he was acknowledged yesterday, I believe, by another Senator—but I also as chairman want to acknowledge the efforts and long-time work of our former colleague, Senator Lowell Weicker, who was the chief sponsor of the Americans with Disabilities Act of 1988, and a long-time champion of people with disabilities.

With that, I would ask if my friend and colleague from Minnesota, Senator Durenberger, has any opening comments.

Senator DURENBERGER. Thank you, Mr. Chairman, just to say that I thought you did an admirable job yesterday with all the pressure and all that. That was very, very well-done, and I would not have been able to do it as well as you did because there are so many people who have certainly preceded me to this table and many of whom preceded you that needed to be recognized.

I don't have a formal statement, but I do want to make a comment about a friend of mine who is going to be testifying, Ken Tice, who is the Director of Advocating Change Together—the acronym is "ACT"—a consumer group which works on behalf of the developmentally disabled.

ACT's focus has been primarily on the State level, where Ken and ACT have been successful in enacting legislation that would establish personnel policies and benefit programs and sheltered workshops on behalf of the developmentally disabled.

Ken has also been successful in enacting legislation that would establish consumer councils that act as go-betweens between management and workers of service providers.

Ken was most recently recognized by Twin Cities Magazine as one of the outstanding Minnesotans of the Year. He has also been a strong supporter of mine, and last night at the Leadership Conference Dinner, I took him over and introduced him to your friend and our mutual friend, Skip Humphrey. And he was smart enough and politically astute enough to say, "I am a Republican Democrat, or a Democrat Republican." So there is no question——

Senator HARKIN. What happened to the Independents?

Senator DURENBERGER. Well, I am sure Ken is also very independent. Again, I am happy that he was there last night and that he could be with us here today for this hearing.

Senator HARKIN. Thank you, Senator Durenberger.

Senator HARKIN. With that, let's call our first panel, which includes Frank Bowe of Hempstead New York, Hofstra, University; Perry Tillman, Paralyzed Veterans of America; Ken Tice, whom we just heard a lot about, with Advocating Change Together; and Lisa Carl, accompanied by Vickie Franke, from Tacoma, WA.

Good morning, and we welcome you to the subcommittee. Again, because we have so many panels this morning, what we will do is take all of your testimony first, through the line, before we open it up for questions.

Let me just state at the outset for everyone here that your full statements will be made a part of the record. Some of the statements that I read last evening are quite long. Obviously, if everyone read their full statement, we would be here probably halfway into the night. So I would deeply appreciate it if you could just summarize the basic points of your testimony in the shortest span of time as possible.

Having said that, again we welcome to our subcommittee, as we have many times before, Frank Bowe.

STATEMENTS OF DR. FRANK BOWE, PROFESSOR, HOFSTRA UNIVERSITY, HEMPSTEAD, NY; KEN TICE, ADVOCATING CHANGE TOGETHER, MINNEAPOLIS, MN; PERRY TILLMAN, III, NATIONAL VICE PRESIDENT, PARALYZED VETERANS OF AMERICA, NEW ORLEANS, LA; AND LISA CARL, ACCOMPANIED BY VICKIE FRANKE, TACOMA, WA.

Dr. BOWE. Thank you, and good morning, Senator.

Mr. Chairman, thank you for inviting me.

As you know, Mr. Chairman, I am deaf; I cannot hear. And like you said, there are a lot of times that people just do not realize what effects that has.

I spend a lot of my life in hotel rooms, and once I am in that room, there is no way for anyone in the hotel to alert me to anything—a fire, an emergency, a visitor, or even a telephone call. It disturbs me that I am taking my life in my hands.

Some of them do have flashing light alarms in the hotels, but they are all out in the hall—and as you know, most of us do not spend the night wandering the halls—unless, perhaps, we have to testify before the Senate the next morning. So those flashing light alarms are of no use to me whatsoever.

A few years ago, I was in Houston. I had to fly to Washington at 6 in the morning. At 3:30, two men broke into my hotel room in

Houston—and they both looked like they were linemen for the Houston Oilers. At 3:30 in the morning, they were shaking me in my bed. They woke me up, and I noticed that they had broken the chain and broken the door, and they were in my hotel room, and naturally, I was very near cardiac arrest.

I asked, "What's going on?"

They said, "Why weren't you answering your telephone?" My telephone had been ringing for 15 or 20 minutes, and I had not picked it up, at 3:30 in the morning. So the hotel, the only way they could tell me was to come up and find out if the reason I was not answering my phone was that I was dead, or that my ears were dead.

I could not get back to sleep, and I caught my flight in plenty of time.

I also travel a great deal, as you know, Mr. Chairman, and I do face a lot of discrimination because these places of public accommodation are not accessible. I arrived last night in Tampa, FL. What everyone else does is they go to that bank of telephones where you can call a courtesy van from the hotel to come and pick you up, a free ride. But I could not do that.

I tried last night, which I frequently do. I found the correct number; I dialed; I picked up the phone. I waited for a few minutes—you know, they never answer on the first ring—and after a few minutes, I started talking. I said, "All right, I'm here, and I want a van ride." This just doesn't work. I do not know what they are saying.

So I had to pay $15 for a cab ride to the hotel, when everyone else got a ride free.

So coming here this morning, I knew I was going back to Tampa tonight, so I told the hotel: "I am arriving at 9:19. May I have a van pick me up?"

They said, "No. You have to call from the airport."

So again tonight, I am going to go through the same routine all over again.

Also, one I am in the hotel room, I cannot enjoy that room as much as anyone else. The television is not captioned, so the first thing I do is look for ESPN—the only thing I can understand. I cannot use the telephone. Using the telephone is a bit strange in a hotel. You cannot just place the call with your TDD; you must go through the hotel operator. And let me tell you, in 20 years of traveling, I have never figured out what the hotel operator wants to know, but she will not let me place my call. She either wants to know what room I am calling from, if I am charging the call to my room or to my credit card or whatever—or else she wants to know what sign of the Zodiac I am—I don't know. All I know is it is impossible to place a telephone call.

So I have sometimes spend two hours trying to get one call through. And you know me, Senator—you know that I am just not that patient. So I take my TDD down to the front desk and I say, "Will you help me?" and they say no, they are not allowed to. I say, "Well, I can't hear. I don't know what the operator is asking me."

And what they always tell me is, "You should call the operator and ask for assistance."

I say, "Well, thank you. That's what I've been trying to do the last two hours, and it hasn't worked."

However, I do have to tell you that the steps that are helping me, like those two men coming into my hotel room—of course, it did terrify me, but on the other hand, that was a mark of sensitivity that they at least tried the only way they knew how to make sure I was okay.

I have had experiences with that kind of sensitivity, which is something I think the Americans with Disabilities Act will promote.

I am trying to make the point that the sensitivity is at least as important as buying equipment, installing ramps, or paying for interpreters. And the sensitivity doesn't cost anything.

One example. I was in Washington—where I seem to spend half of my life, even though I live in New York—I had to be in New Jersey for a meeting but Washington was snowed in—you know, this happens once in a generation, snow falls. So we couldn't get out of the airport, and I took a 10:30 train from Amtrack up to New Jersey, which got to my location in New Jersey at 3:30 in the morning. I figured I would be asleep, so when the conductor came to take my ticket, I said, "We're getting to this God-forsaken place in New Jersey at 3:30 in the morning, and I am going to be asleep—will you wake me up?"

And he said yes, he would. As it happened, I was still up at 3:30, because I never trust people. But he came in at 3:30, and so did four other conductors. They all converged on my car to make sure I was up and got off at the right stop. That doesn't cost Amtrack anything, but that is the kind of sensitivity that would be promoted by the Americans with Disabilities Act.

I just want to emphasize that these problems are very solvable—they are all solvable—and the Americans with Disabilities Act is urgently needed to solve them.

With respect to the fact that you are on a tight timetable, I want to conclude here. We will be happy to answer any questions you may have later on.

I want to thank you again for the opportunity to testimony.

Senator HARKIN. Thank you very much. That was wonderful.

[Prepared statement of Dr. Bowe appears in the appendix.]

Senator HARKIN. Mr. Tice, we are happy to hear from you now.

Mr. TICE. Good morning, Mr. Chairman and members of the committee.

I am Ken Tice from Advocating Change Together, in Minnesota. I am very happy to be here today.

Usually, I lobby the State legislature in Minnesota, but I am very happy to be here to lobby you people about a very important piece of legislation, ADA.

I want to tell you briefly my story. A long time ago, I was working in a hospital in Minneapolis, Minnesota, doing janitor work and taking food carts to the patients. I had a 60-day probation period. After 60 days, I was fired. I think it was because of my disability. If they had made a few changes, I could have done the job. But they would not make any changes, and I lost the job.

A long time ago, I was working as a janitor. My boss said to me, "You will never have a janitor job because of your disability. You are not capable." I went and got another janitor job at ACT, and it worked out really good. Another person with a disability trained me how to do the job.

Finally, a couple of months ago, I was at a restaurant, and being that I was mentally retarded, they did not serve me.

Discrimination really hurts. It hurts very much. We need to stop discrimination now.

I want to thank Senator Harkin for sponsoring this bill. I am very proud that my own two very good Senators, Senator Durenberger and also Senator Boschwitz from Minnesota, are cosponsors. I am very proud.

People from all over America are watching and waiting for this bill to be passed so they can take their place in society.

Thank you. Let's all help each other to improve the lives of people with disabilities before this decade comes to a close.

Thank you.

Senator HARKIN. Ken, thank you very much. We are glad you are here.

Mr. TICE. You're welcome. It is nice to be here.

Senator HARKIN. Perry Tillman.

Mr. TILLMAN. Senator Harkin and members of the subcommittee, my name is Perry Tillman. I an the National Vice President of Paralyzed Veterans of America.

I come to you today not only as an officer of PVA, but as a disabled veteran who has experienced the types of discrimination which the Americans with Disabilities Act will eliminate. I believe that with the enactment of this legislation you will help me and other disabled veterans enjoy the freedom we sacrificed so much for. Together, we can end the second-class treatment of all disabled people.

I am a systems accountant for the U.S. Department of Agriculture in New Orleans, Louisiana. I have worked there since my graduation from Xavier University after returning from Vietnam.

As a child, I suffered from an asthma condition. That did not matter to my grandmother, and she made me go to school anyway. She was a hard lady, but she was fair. She taught me many things. She taught me to be strong and not to let things get the best of me, no matter how big or how small.

In June of 1965, I was inducted into the U.S. Army. I went because my country called, and it was my duty. At the advanced basic training, I decided I wanted to be a paratrooper. I could see myself coming home with those airborne wings on my uniform to the housing development where I lived. My grandmother would be proud of me, I thought.

I will never forget that flight we took from Travis Air Force Base in California to South Vietnam. At that time it seemed just like another training exercise to me. It was difficult to realize that some of the young men would never come home again. Like so many other young men in my company, I thought it would take us maybe six months to end the war, and we could be back in the States.

Well, I returned home only three months later because I was injured on a combat mission, in a helicopter crash. One of my buddies was killed; another lost both legs due to the propeller blade being sheared off.

I was lucky, Mr. Chairman. I lived. Four days later, I regained consciousness. The first thing I remember was the agonizing pain of being rotated on a striker frame. After my injury was stabilized, I was flown back to the States, where I was sent to the VA Spinal Cord Injury Center in Memphis, Tennessee.

After spending eight long months in the hospital and after going through long hours of rehabilitation to learn how to use my wheelchair and to take personal care of myself, I was finally ready to go home.

However, I found that home was not ready for me and my wheelchair. As a service-connected disabled veteran, I thought my country would do everything it could to make my life whole again. The VA did its best to restore my health and rehabilitate me; they tried to prepare me for my life in a wheelchair, and they provided me with medical benefits and benefits that allowed me to go to college.

I went to Vietnam, like a lot of other young me, to fight for our country's ideal: Freedom and the ability to become whatever we dreamed of. I did my job, but my government let me down. You see, when I came home, I found out that what I fought for applied to everybody but me. There were no laws that would stop people from discriminating against me because I was in a wheelchair.

My dream was put on hold while I continued to fight for these ideals myself, from a wheelchair.

In 1966, when I came home from Vietnam, America was not accessible. In many areas of the country, it still is not. I could not even use the bathroom in this building. I could not ride the bus here today because not every bus has a wheelchair lift.

Although my grandmother taught me to be strong and not to let things get the best of me, I cannot wish myself on a bus; I cannot make my wheelchair smaller to fit into an inaccessible lavatory; the housing project where I live was not accessible. In order to get in or out of my home, my mother had to carry me up four steps.

So I fought back. My fight for improved accessibility started in 1966 with those four steps. Those obstacles made it virtually impossible for me to leave my home unassisted. This was my first encounter with inaccessibility.

When I came home from Vietnam, I could not even go to a restaurant without first calling in advance to see whether they were accessible. I have seen the kitchens of many restaurants. They always say the same thing: "Our main entrance is not accessible but our service entrance is." I'll bet you I have heard that explanation at least a million times. I have also had to pass up going to many places because even their service entrance was not accessible.

I never thought that this would happen to me when I was flying combat missions in Vietnam. I thought people would welcome me back as a veteran, not shut me out. The idea that disabled people are sickly and should stay at home is a myth.

In the early 1970s, a group of my friends and myself formed an organization called "PLACE", that would serve as a clearinghouse to speak for people with disabilities. We had one goal, and that was to improved the lives of those disabled individuals in the State of

Louisiana. One of our most important victories was getting a handicapped license plate bill passed.

I have been an active member of the Regional Transit Authority's Elderly and Handicapped Committee since 1982. We have continually debated the pros and cons of an accessible fixed-route system against a dial-a-ride system. If I had my choice, I personally believe in an accessible fixed-route system because "separate but equal" has never been equal.

I visited the Seattle, Washington transit system, which has been a model of transit accessibility. I brought back all the information about the Seattle success story to RTA, but they did not listen. They, in their wisdom, implemented a dial-a-ride type of system. With our system, you have to plan a trip 24 hours in advance, and you cannot travel with a friend, because that friend who comes in from out-of-town because you have to be a resident of New Orleans to use our Regional Transit Authority's paratransit service.

Sometimes the adversities which I and so many other disabled veterans encounter are a bit much to bear. I thank God for my grandmother pushing me the way she did. She taught me to roll with the punches. But not everyone has a grandmother like mine to help them through the rough times.

I did my job when I was called upon. Now it is your job, and the job of everyone in Congress, to make sure that when I lost the use of my legs I did not lose the ability to achieve my dreams. Myself and other veterans before me fought for freedom for all Americans. But when I came home, and I found out that what I fought for applied to everybody but me and other handicapped people, I could not stop fighting.

I have fought since my injury in Vietnam to regain my rightful place in society. I ask that you now join me in ending this fight and give quick and favorable consideration to the Americans with Disabilities Act in order to allow all Americans, not just some, to take equal part in American life.

Thank you, Mr. Chairman. I will be happy to answer any questions that I can.

Senator Harkin. Perry, thank you very much for being here today and for coming the distance.

[Prepared statement of Mr. Tillman follows:]

Senator Harkin. Next, we will hear from Lisa Carl and Vickie Franke. Welcome to the subcommittee.

Ms. Carl. Thank you.

On May 23, 1988, I decided to go to a movie. The movie was "Three Men and a Baby".

The movie theater was around the corner from my house.

I waited in line, and when I got to the counter, I gave the lady my dollar. The lady would not take it. She said that I could not go on.

I asked her, "Why?" She said, "You just can't. Do you hear me?"

I said, "Yes, I hear you. I just want to know why. I just wanted to see the movie."

Thank you.

[Prepared statement of Ms. Carl appears in the appendix.]

Senator **Harkin**. Lisa, thank you. That was wonderful testimony. Ms. Franke?

Ms. **Franke**. Good morning. Thank you for having Lisa and me here.

When Lisa came home and told me that they would not let her into the theater to see the movie, I called the theater owner and asked her why. She basically said, "Because I can't understand what she wants."

I pointed out that they were showing one movie, and the admission price was one dollar, so more than likely, if a person approached you and gave you a dollar, you could assume they wanted to see the movie.

She replied: "She can't even open the goddamn door."

I said, "Well, that's not entirely true. If you give her a minute, she could, although we often encounter people who will open the door for her"—for me, and for many other people.

She said, "People should not be required to open the door for her."

I said, "Well, at any rate, if there is something that has happened, if there has been an incident that we can talk about, if something has happened"—because Lisa had attended a movie there prior to that.

She said, "I don't have to talk to you about it. I basically don't have to let her in here, and I don't want her in here."

I stated that it felt like they were discriminating against Lisa based on her disability. She again said she did not "give a goddamn what it felt like" to us and slammed the phone down.

It has been actually a year today that that incident took place, and today Lisa is still not allowed in that theater, for no reason that we know of. That is also the only theater in our neighborhood that is accessible in terms of distance for Lisa to get there independently. So she has been denied the right to independently go to a movie.

Thank you.

Senator **Harkin**. I think it is important, perhaps—Vickie, would you like to read the first part of Lisa's written statement?

Ms. **Franke**. Yes.

"On May 23rd, 1988"—which was actually May 10th—"I decided to go to a movie. The movie was 'Three Men and a Baby'."

"The movie theater was around the corner from my house. I waited in line, and when my turn came, I tried to pay my dollar. But the owner of the theater would not take my dollar. She said I could not go in."

"I asked her, 'Why?'" "She said, 'You just can't.'" "'Why? 'I asked her again."

"She said, 'Do you hear me?'"

"'Yes, I hear you,' I said. 'I just want to know why.'" "She would not say. She said, 'Would you move out of the way?'" "I left. I felt embarrassed. I went home. I was not crying outside, but I was crying inside. I just wanted to be able to watch the movie like everyone else."

Senator **Harkin**. Would you also just read the first part of her written statement? I think it is very important—would you just read the first four paragraphs.

Ms. **Franke**. OK.

"My name is Lisa Carl. I am including this written statement with the one I am orally presenting to you because my speech is made slow by C.P., and I have only a short time to speak, but I have a lot of things I want you to know. I would like you to know a little about me."

"I am 20 years old. My birthday was last Friday."

"I am intelligent, interesting, active, and happy. My friends tell me that I am pretty—since they are my friends, I can't say they are lying."

"I would like to tell you about what I can do. I can ride horses, go to school, hang out at the beach, go shopping, take a bus, feed and dress myself, carry on an intelligent conversation, and I like to go to the movies."

"The reason I can do so many things is because when I was growing up, my mother told me every day: Lisa, you can do anything you want. I believed her then, and I believe her now. What I can do is a longer list than what I can't do."

"What I can't do is anything that requires a lot of physical coordination. For example, I am not qualified to be a professional basketball player. That is because I have cerebral palsy. The only thing that is wrong with me is that I have physical limitations on what I can do."

"I have all the same hopes, dreams and wishes of any young woman—to lead a productive live, get married, have children, be respected in my community, and to shop until I drop." [Laughter.]

Senator **Harkin**. You are all just wonderful to be here, and each of you in your own way has, I think, really summed up why this is so necessary.

Lisa, I can't tell you how many times—and this just happened to me yesterday afternoon when I spoke to a group in Washington after we had had hearings here yesterday morning, and I was talking about this bill. I said do you know, for example, if you were a black person, and you went to one of those fancy restaurants down the street—I was over in the other part of town—and the owner came over and said, "We're not going to serve you here because you are black"—that is against the law, and that person could go out an file a lawsuit and win because of the Civil Rights Act of 1964.

But I said if a person is in a wheelchair or had cerebral palsy and came into that restaurant, and the owner came up and said, "We don't want you in here. You make me nervous. Get out of here"—just like the theater owner did to you—it is not against the law, absolutely not against the law. You can still openly discriminate against people with disabilities in our society.

When I tell people that, they are, quite frankly, shocked. They don't understand that. That is why I believe that your story and Perry's, Ken's, Frank's, all of the years of frustration—and you and I have talked many times about that—I remember going out to see my brother one time, who is deaf. He lives by himself in a house. It was in the morning, and I had not thought about this, but he had the blinds pulled and the doors locked. And I tried to get hold of him. I could see my brother in there through a crack in the blinds, but I could not get him to come to the door. I banged on it; I stomped on the porch; I banged on the windows. Finally, I realized we had to get one of those doorbell things with the light on it. That was really frustrating.

In fact, a couple weeks after that, I called him on my TDD, and he asked, "How come you don't stop and see me anymore." Well, that was the end of that, and we got a light there.

So these kinds of stories just bring into very human terms the fact that people who have a disability are only limited by that disability—nothing else. That person can't hear. All right, they can't hear. There are a lot of other things you can do. You may be limited in your physical abilities. There are a lot of other things you can do, and you should be able to do—and our society, by gosh, ought to make those doors open and make sure that we have these things accessible, and make sure we don't have that kind of discrimination.

I think it was Frank who said that the passage of the ADA bill will begin to sensitize people, get them to understand, and sensitize them as to what they are doing and begin, aside from just the aspect of the bill that will tear down these barriers—I think that is the other part of this bill that is so important, is just to get people sensitized as to what is happening.

That is why your testimony today is so important, and I can assure you that the things you have told me here today will be repeated on the Floor of the Senate when we bring this bill up.

I really don't have any questions. I would recognize Senator Durenberger.

Senator DURENBERGER. Thank you, Mr. Chairman, and thank you for giving each of these people the opportunity to come here today and make their stories part of the record of the hearing.

For me, this is an ongoing educational process, and I hope it is for everybody in this country that, beyond the legislating that we do, it is the understanding of what persons with disability face each day that is a lot more important. I was reminded as I looked here at this table of two persons who are not quite as mobile as two other people here—that recently in Minnesota, this very progressive State that Kenny and I represent, the Minnesota Chamber of Commerce had a commercial on television on the legislature's efforts to "enrich" the workers 'comp program for persons who suffer work-related disabilities. They used as their vehicle an outline of ten people, one of whom was in a chair, and the other nine were standing.

The implication of the message was that for every ten people that the system says are disabled, there is probably only one that is really disabled. In other words, unless you can physically see somebody's disability—like the folks who will open the door for Lisa in the movie theater—everybody else is just like everybody else.

And I think what is so interesting about the hearing process leading to the ADA is that the people at the Minnesota Chamber of Commerce, their commercial advertisers who put that whole thing together, and others are going to learn a lot more about disabilities than what meets the eye.

I hope that out in Minnesota, and around the country that the ADA will help sensitize people to the nature of the problem. But more importantly, that those with disabilities realize that the problem that those of us who aren't faced with these disabilities have is a much bigger problem than yours.

Thank you, Mr. Chairman.

Senator HARKIN. Thank you very much, Dave.

Let me thank you all, some of you for coming a great distance—Perry, are you here in Washington?

Mr. TILLMAN. No, sir. I am from New Orleans.

Senator HARKIN. And Ken, I know you came from Minnesota.

Mr. TICE. Yes, Senator, North Minneapolis, MN.

Senator HARKIN. And Frank, I know you came a great distance, and Lisa, you came from Tacoma, WA.

Ms. CARL. Yes.

Senator HARKIN. That was a long plane ride—and you are her mother, right, Vickie?

Ms. FRANKE. Yes.

Senator HARKIN. Well, Lisa, let me just tell you this. Unless I miss my bet—no, I'm not going to even say that—we are going to pass this bill this year. And next spring when you go to that movie theater, you just wheel that chair up there as proud as you can, and you say, "Let me in, and don't give me any back talk"—OK? Next year you'll get in. I promise you that.

Ms. CARL. Thank you.

Senator HARKIN. We'll get it passed. Thank you all very much.

Now let's hear from our second panel, which includes Bob Burgdorf, National Easter Seal Society; Malcolm Green, National Association of Theater Owners; Sally Douglas, National Federation of Independent Businesses; William Ball, Association of Christian Schools International; Ron Mace, Barrier-Free Environments, Inc., and the Honorable Neil Hartigan, Attorney General from the State of Illinois.

Would you all please come up to the witness table?

We'll start with Ron Mace, and again, as I said earlier, your full statements will be made a part of the record, and if you could summarize as succinctly as possible, I would sure appreciate it. Mr. Mace?

STATEMENTS OF RONALD L. MACE, PRESIDENT, BARRIER FREE ENVIRONMENTS, INC., RALEIGH, NC; WILLIAM B. BALL, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, HARRISBURG, PA, ACCOMPANIED BY DR. SHARON HUGHEY; HONORABLE NEIL F. HARTIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, CHICAGO, IL; SALLY DOUGLAS, ASSISTANT DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, WASHINGTON, DC; MALCOLM GREEN, CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF THEATER OWNERS, BOSTON, MA; BOB BURGDORF, VICE PRESIDENT FOR PROJECT ACTION, NATIONAL EASTER SEAL SOCIETY, WASHINGTON, DC

Mr. MACE. Thank you, Senator.

I am Ron Mace. I am an architect and a product designer, and I am the president of our company called Barrier Free Environments, in Raleigh, North Carolina.

We are specialists on a full-time basis in design for disabled and older people. We have become known for this over the past 15 years, and we have extensive experience in the area of building design, product design, and cost—probably more than anyone else, because we believe we are the only firm that has been doing this full-time for all of that time and involved in codes and training and education as well as doing projects in the field.

My comments on the ADA are focused on the architectural implications of the public accommodation provisions. And I am really here today with my vast experience in past years to say to you that there is no reason why we cannot make all new buildings and products fully accessible and usable to everyone.

We have a term we use for this. We refer to this as "universal design". It is a design issue, largely, predominantly a design issue in my opinion. We can do this now with no measurable increase in cost. We have the technology and the experience and the skill to produce usable facilities that are attractive and marketable and usable by everyone. Even in modifications to existing buildings, done with appropriate knowledge, care and reason, the costs are minimal.

We have a lot of experience in the last 10 to 15 years in modifications in order to meet the program access requirements of Section 504 of the Rehabilitation Act. Early in that effort, there were perceived costs to be literally in the billions of dollars. Most recipients of Federal money have found that those costs are not near what they were imagined in those days.

There are a number of simple things that can be done, mundane things even, in existing facilities, to make adjustments on a reasonable basis to provide better accessibility. I have itemized some of those in my written testimony.

This type of design is not common practice at this time in the building industry, for a variety of reasons. And although costs are almost entirely the reasons that are given by people in the construction and building and design areas——costs and technical impracticality are the reasons we are given for not doing this—in reality, the real reasons are lack of information, poor understanding, and virtually no training or experience with the issues in the field.

There is right now no training provided for designers in our country on how to design for children, older people and disabled people. You go through the schools of design, and you come out with education that preaches design for able-bodied, adult, and generally adult males.

In addition, if you add to that the numerous negative attitudes and prejudices that predominate, you can see why we are not producing facilities that are accessible.

I am a disabled person, and like other disabled people, I have experienced the type of subtle discrimination that facility design causes. I once drove 1,500 miles to go to a World's Fair to see one particular exhibit. When I arrived at the door of that exhibit, I was denied access to it. The reason I was given was that I was a fire hazard, that insurance requirements prevented the exhibitor from allowing me into the building—although the building, from what I could see, was reasonably accessible, and I could have used it, although it would not be technically accessible.

Recently, I was refused service in a seafood restaurant with a group of friends because I and my wife could not sit on the stools at the steam bar for the oyster bar. When questioned about it, the owner refused to provide service to us, and asked us and the group of people, 11 people, who were with us, to leave, to get out and don't ever come back.

The examples just go on. For years, in doing seminars for my company and for Government agencies, we wind up at hotels where we are ordered to come in through the garbage cans and the slop sinks in the kitchen as the only way to get into this public facility. That is common throughout the country.

Again, these things keep happening, and cost is always given as the reason. It is continuing to go on even today. Monday of this week in our newspaper in Raleigh, North Carolina, an article came out about a new veterans 'memorial that is being designed and to be constructed on our Capitol Square in our city. The article went on to give the cost for this monument and a picture of it. It is designed inaccessibly; it is a veterans 'memorial. There are steps up to the monument itself. I know from other information that there has been comment about that.

So in the newspaper comes an article, itemizing the money that was raised, some $450,00, for the monument, and, quote, "an additional $150,000 to provide handicapped accessibility" with ramps to this monument.

It is a disgrace that this monument was ever designed so that even if it did have to be accessible, to say and publish in the newspaper that this was going to cost an additional $150,000 to do this. This monument should never have been designed this way to begin with.

So that puts out in the public mind and in the mindset of the industry that accessibility costs more. It does not cost more. We can prove it over and over again.

The training that is lacking in the schools helps to generate this. There is no understanding of how to do this. There is no education, no practical experience in the field for these people who produce what we live with in our environment.

As a result of this, people in the field rely entirely on building codes as their only source of information. If you want to do a good job, what do you do? You look at what is required. What is required throughout our country are minimal, sketchy specifications for accessibility. The codes are a poor substitute for understanding and education and training. They are developed with a minimal mindset; they have to be.

In some States there are no codes. In some States there are codes, and they are a local option. In many, many States, there are codes, and there is no enforcement and no other recourse for someone who finds that they are not being followed.

The people who develop the codes—and I have worked with numerous States on the development of their codes—are committees of people who come together to say what should be done, and again, with this mindset—well, we'll do a few things in a few places for a few special people.

I can't help but remember these comments in these code development meetings. You will get comments like, "We don't need to make grocery stores accessible, do we, because they can't buy their own groceries; someone has to do that for them."

Or, "We should make hospitals and medical facilities accessible, but why do we have to make theaters accessible? They don't go there. They need to get to their doctors, don't they?"

These are real comments. I did not make these up. These were from people who were trying to honestly consult on the development of codes.

I served on our Building Code Council for six years, and I heard appeals come with this naive, negative attitude for 6 years at every Council meeting.

One further example, and I will wrap up. Realizing that there was a pervasive lack of technical and design information in this area, my firm joined another and proposed to put together an information package and technical assistance package to the design industry on the products that are on the market now that make this easy and inexpensive, and technical, illustrated manuals on how to use them and how to install them.

We hired a market research firm to survey architects and builders to see if they would be receptive to this and if this would save them money and reduce the cost of their accessible buildings. We got an overwhelming response, 92 percent of those surveyed, who said they would buy this information system because it would reduce their costs in their work, and it would reduce the cost of the accessible buildings they produced.

We put it on the market, and it sold out—but not to the design and construction industry. It sold out to the rehabilitation and disability community and the advocates.

We went back and did a followup market study to find out why did the design and construction industry not buy this information package that they felt was so valuable. They said, universally, "Oh, we were going to do it when we had a project for which it applied." So you see, the mindset was very clear that these are things that we only do in a few special places, for a few special people. It is not something that is part of our common practice in our industry.

It is time that we make it clear that this issue applies to all facilities, all of the time, and the ADA will send that message. And when it sends that message, there will no doubt be a period of adjustment, there will be a period of learning, and it will become common practice to teach new designers and builders how to design this way without increasing their costs or without making their buildings unattractive and not marketable.

Many of the things that are mandated in our codes are very unpleasant, and sometimes do hurt the value of a building. It is not what we can do in the future.

Twenty-five years ago, the racial Civil Rights Act eliminated special separate facilities for racial minorities. Now it is time for the ADA to do the same thing for disabled people.

Thank you.

Senator HARKIN. Ron, thank you very much. I will come back to questions after we hear from the panel, but one that I want you to be thinking about is what is happening in schools of architecture and design, and is there anything that we might be able to do here to encourage them to start changing their thought processes and how they teach. I might want to discuss that with you when we get back.

[Prepared statement of Mr. Mace appears in the appendix.]

Senator HARKIN. Next, we will hear from William Ball, from the Association of Christian Schools International. Welcome to the subcommittee.

Mr. BALL. Thank you, Senator Harkin.

Senator, the Association of Christian Schools International has asked that a distinguished woman professional, blind from birth, Dr. Sharon Hughey, be with me today, and I have taken the liberty of asking her to sit here. Dr. Hughey's statement in support of our statement is attached to mine, and I very earnestly implore you to read it carefully.

The Association of Christian Schools International and Dr. Hughey and I personally want very much to commend you, Senator Harkin, for your very compassionate interest in the rights and interests of disabled people.

I myself have had a particular interest in deaf people and am in Federal court right now in another State, defending the right of a deaf child to services under the Education of the Handicapped Act.

ACSI, Association of Christian Schools International, is an organization of about 300 protestant evangelical schools throughout the United States. Eighty percent of these are church-operated. They are racially nondiscriminatory, and they are giving our society, I think it is true to say, a stream of literate young men and women who are also grounded in traditional morality, which is a great benefit, I think, to our society.

I have to stress that these schools are not State or Federally financially assisted, and they decline such assistance out of the Biblical principles which they think govern them.

Like most churches, they have to live extremely close to the line of very small budgets, because they depend for their existence financially upon the sacrifices which parents make who also pay the public school tax in sending their children to religious schools, and they also depend greatly upon the financial sacrifice made by their teachers who have dedicated themselves to the rearing of children in these Christian schools.

ASCI is very, very sensitized to the very thing that you, Senator, were speaking of when you spoke about the need for sensitivity to the rights and interests of disabled people. But the parents who send their children to these schools of ASCI are parents who are doing so voluntarily; they have voluntarily enrolled their children in those schools, and they desire to have them there, obviously, hoping for the best service that they can get for those children in the schools who are disabled.

The ASCI and its schools find two basic problems with the Act as drafted. First of all, it takes religious schools and converts them into places of public accommodation, which I think is a first—it certainly is a first in Federal legislation and probably in legislation as seen in all the States. In Pennsylvania, for example, we have a definition in our State Human Relations Act of places of public accommodation; however, then the Act goes on to recite that this does not include places distinctly private.

Obviously, a religious school as well as a church are entities which are distinctly private entities. When we look at this Act, we say that it is a commendable act in that it is intended to be sweeping in its coverage, and we believe that it is certainly an act which should cover businesses, which should cover industries, and which should cover publicly-funded institutions. We are not, and the churches in the country are not, mostly, publicly-funded institutions.

The Act, as I say, is sweeping in its coverage and relates to aids, services, structural accommodations, job restructuring, work schedules, equipment and devices, and also gets profoundly into certain areas of governance of churches and private schools, religious schools.

We find, as we have examined this bill, that we are deeply concerned that there would simply be a totally inability of our schools to comply with its financial requirements. It does create a very, very broad range of protections for the disabled, and indeed, public institutions, publicly-funded institutions, businesses, and the multitude of industries in the country can and should comply with this Act.

It is a quite different thing, however, when you are talking about a religious school or a church-operated school or churches.

It is true that Section 402(b)(3) of the bill says that if you can demonstrate that this will produce an undue burden upon you, then you can be excepted. But to do that, to prove an undue financial burden, means really that the religious school would have to disclose its financial records and permit a thorough investigation by Government of its means of subsistence—these, again, not being Federally financially assisted schools that I am speaking of when I speak of ACSI schools.

Also, I think it will be true that when it comes to enforcement of the Act that the Government agent responsible is likely to say, "Well, there aren't any exceptions in this Act for churches or for religious schools; hence, we are going to apply the Act as we would apply it across-the-board to secular institutions."

We are concerned about certain aspects of its requirements with respect to disability. Here, I would have to refer you specifically to pages 8 and 9 of my written testimony. The provisions with respect to a qualification standard, which would seemingly on the surface protect a religious school with respect to alcoholics or drug abusers, contains a qualification that their conduct not pose a direct threat to property or the safety of others in the workplace or the program. And we have to beg you to understand that on the clearest grounds of religious teaching, ACSI schools cannot undertake any employment of alcoholics or drug abusers, regardless of whether his or her use of alcohol or drugs poses any threat, direct or indirect, to the property or safety of the school or children on its staff. They will not employ users of alcohol or drugs.

Again, we have a concern on the provision which can, under the Arlene decision, relate to AIDS. Our schools will not employ homosexual persons, and if an individual has AIDS and that has resulted from immoral conduct, he or she will not be permitted employment in an ACSI school, regardless of whether the threat is direct or indirect to the health or safety of anyone.

Finally, I would refer you to the sections of my testimony which deal with Constitutional questions in addition to the question of making these schools into places of public accommodation. Clearly, under a series of Supreme Court decision—the Hobbie case, Lemon v. Kurtzman, Walz v. Tax Commission, NLRB v. Catholic Bishop of Chicago, a measure which involves Government profoundly in essential religious matters of religious schools and which may heavily burden them with monitoring and surveillance reaches the requirements of the First Amendment.

Senator, thank you very much, and at the end, I merely remind you of the presence here of Dr. Hughey. I remind you of her testimony and certainly, she desire it to be known that she is available for your questions when you come to a time of questioning.

Thanks very much.

Senator HARKIN. Mr. Ball, thank you very much for your testimony.

[Prepared statements of Mr. Ball and Dr. Hughey appear in the appendix.]

Senator HARKIN. Senator Simon is here with us. I know he has a busy schedule and has another committee that he has to be at. But I want to yield to him for the purpose of an introduction, and then we will move to that next witness.

Senator SIMON. Yes, Mr. Chairman. I regret that the Foreign Relations Committee is meeting, and we are making decisions on the FSX. The Secretary of Defense is testifying now, and I am going to have to get back because we are going to have a vote at the end of his testimony.

I do want to take the opportunity to introduce someone who has been a leader in the field of helping the disabled, and that is the Attorney General of Illinois, Neil Hartigan.

When he became Attorney General, he established a Disability Division within the Attorney General's Office for the first time in the history of Illinois. The Illinois Environmental Barriers Act is a bill that he wrote and successfully lobbied for, which removes barriers in the State of Illinois and requires new buildings in the State of Illinois not to have those barriers.

He has also taken a look at the whole question of health insurance for people who have disabilities in our State.

He is a consistent record of standing up to create opportunity for people with disabilities and that is what this legislation is all about.

I am very pleased to introduce Mr. Hartigan, and I regret I have to walk out right after introducing him. I am sure Neil Hartigan will understand why I must leave, but I am pleased and honored to have him here.

Senator HARKIN. I just want to recognize the Senator from Illinois, our good friend Alan Dixon, who has come here to also join in welcoming our witness.

Senator DIXON.

Senator DIXON. Thank you, Mr. Chairman. I am delighted to be here and to have an opportunity to hear our great State of Illinois Attorney General, Mr. Chairman.

Senator HARKIN. We are also honored to have the chairman of the committee here.

Senator Kennedy, our next witness is the Attorney General of Illinois.

Senator KENNEDY.. He has been a good friend and a very important leader in Illinois in so many of the areas that this legislation touches, the structural changes, transportation, communication, and as I understand, has a very effective department in his own Attorney General's Office, which ought to be an example to other Attorneys General in other parts of the country. So I know we will learn a good deal from his testimony.

I thank the Chair—and I want to extend a warm welcome to the rest of the panel as well.

Thank you.

Senator HARKIN. Thank you, Mr. Chairman.

Attorney General Hartigan, again, welcome, and please proceed.

Mr. HARTIGAN. Thank you very much, Senator Harkin, Senator Kennedy, Senator Simon, Senator Dixon and members of this committee for giving me the opportunity to testify whole-heartedly in support of the Americans with Disabilities Act of 1989 and to share with you some of the human circumstances that we have dealt with in Illinois that show the critical need for a Federal commitment of this kind.

A little earlier this morning, you heard first-hand reports of shameful and inexcusable instances of discrimination against persons with disabilities in this country. Not one among us would say that such experiences should be part of anyone's life in this land of opportunity.

For over 6 years, I have heard similar reports from people with disabilities in our State, the State of Illinois. As Senator Simon pointed out, shortly after becoming Attorney General in 1983, I was approached by Elaine Hirsch, my colleague to my right, who serves as the Director of Advocacy in the Illinois Attorney General's Office, about establishing a Disabled Advocacy Division; and I did that, the first of its kind and the only full-fledged division in any attorney general's office in the country devoted full-time to disability rights issues at the State level.

This division acts on complaints from citizens with disabilities and fights for their rights. The division's work has brought home to me and to thousands of others in our State the insurmountable obstacles and terrible frustrations that occur in the lives of people with disabilities on a daily basis.

We fail to confront the real scope of the problem if we consider only the most dramatic examples of the discrimination. We must also consider the simple, ordinary, daily routines that most of us take for granted—matters like going to work or to school, going out to dinner, going to a movie, access to health care—and the list goes on and on.

If part of your daily life is a wheelchair, you can't go to work if you can't board the bus; you can't go to a restaurant if it has only steps for an entrance; you cannot exercise one of your most basic rights as an American if the polling places are not accessible; and you cannot attend town council meetings on the second story of a building that does not have an elevator. If you are visually impaired, a child visually impaired with a guide dog, you cannot participate in park district programs when the park has a "no dogs" rule.

In Illinois, we have made significant progress in removing these obstacles from the lives of people with disabilities. Our Disabled Advocacy Division works with an Advisory Council of over 70 leaders from every section of the disabled community. They drafted and they fought for passage of a strong new Illinois Environmental Barriers Act.

Mr. Chairman, I respectfully suggest that what the Federal Act is doing is already in place in large part in Illinois, and it works. This Federal Act is something that is needed so it can work everyplace in America.

Our experience shows that the Environmental Barriers Act which requires newly-constructed and remodelled facilities used by the public to be accessible, whether publicly- or privately-owned since the fall of 1985 actually works. We have resolved over 3,000 complaints, and in the context of enforcement, we haven't had to go to court to resolve those complaints.

Other new laws we have drafted and successfully fought for strengthen the State's parking provisions for persons with disabilities; improve access to polling places.

I would like to pause for just one moment on that. Illinois, as you know, is a rather fiercely partisan State every now and then. The entire process was denied to disabled people in Presidential campaigns and in other campaigns, because they would oftentimes have to vote absentee, literally vote absentee a month before the major debates of the campaign would take place, oftentimes. Literally, by administrative rule, the State Board of Elections, pursuant to discussions with our office and with our advisory panel, changed the entire process and has gotten compliance in every, single polling place in Chicago and now virtually throughout the State of Illinois, so people are able to exercise the most basic right in a democracy on a full and equal bases. And there was no lawsuit involved in that, as there won't have to be in many of the things that you are trying to do with this Act.

The special education needs to make the system more responsive to individual needs of young people with disabilities—and all of us take particular pride in the new Illinois Comprehensive Health Insurance Plan, which Senator Kennedy was so much the inspiration for, which we successfully fought. It took us five years, Senator—5 years—to get it into existence——

Senator KENNEDY. It has taken us 25 years.

Mr. HARTIGAN. Well, your 25 made it five for us. So we are delighted you led that fight. But it took us 5 long years of complications and setbacks. The plan makes adequate and affordable health insurance coverage available to people who previously could not obtain it because of disabilities such as arthritis, heart disease, cancer, and sickle cell anemia.

We have one and one-quarter million disabled people in the State of Illinois. They are referred to oftentimes as "handicapped". Our experience is that they aren't handicapped—society is handicapped when we don't have access to their full skills. So that is really what our whole effort has been about, what Senator Dixon and Senator Simon and myself have been trying to work toward in Illinois.

We stopped an airport limousine service that had a practice of charging double fares for visually-impaired persons who were accompanied by guide dogs, or persons who had wheelchairs—that was considered "extra baggage" by this limousine service. If they charged a double fare for any other minority, it would be a violation of Federal laws against discriminatory practices.

As Federal law now stands, we are able to stop this practice only by taking action under the public accommodations section of the Illinois Human Rights Act. That doesn't make any sense. We need this law in transportation, housing, and every other area that we are talking about here.

We have also been involved in litigation to ensure that main line buses are lift-equipped in the Chicago service area. In the next several months, 700 lift-equipped buses will be on Chicago streets, providing main line access for people with disabilities for the first time in the history of Chicago.

We have attempted to fight the battle in Chicago. Some progress has been made, but much remains to be done. People with disabilities should not have to win these rights on a State-by-State basis. Equal opportunity isn't just an Illinois principle; it is an American principle. It is long past time—and I salute you for bringing it to this point—that a national policy that puts persons with disabilities on equal footing with other Americans comes into existence.

The Americans with Disabilities Act of 1989 can make such a national policy reality. It has been carefully structured to address the full range of needs with persons with disabilities—transportation, jobs, communication, public services and accommodation.

Uniform provisions under Title III of the Act would be particularly helpful in the area of public services. Under the current Federal law, the Rehabilitation Act's nondiscrimination requirements are tied to the receipt of Federal financial assistance. Unfortunately, what this translates to is total confusion for the disabled community and the inability to expect consistent treatment. Where there is no State law prohibiting discriminatory practices, two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently than others who don't have the disabilities.

Title IV requirements will eliminate another division in standards that has allowed discrimination in some facilities but not in others. Under Title IV requirements, all facilities used by the public must be accessible whether they are publicly or privately owned, and the provision is patterned after our Illinois law. I can tell you from experience that it is enforceable, and it is enforceable, by the way, without a complete new administrative structure and without having to go to court on a day-to-day basis.

The Disabled Persons Advocacy Division of our office responds to complaints of noncompliance every, single day of the week in the State of Illinois, although we are prepared to and we will go to court if it is necessary. We have to date been able to resolve, through voluntary compliance, 3,000 individual cases. All of us can surely agree that the time is long since past when it was legal or morally acceptable for public facilities to have signs saying, "Whites only". But a restaurant or a theater with steps for an entrance, or an office building with a third floor bathroom and no elevator in effect has a sign saying, "Able-bodied only".

The bill before you has also followed the example of Illinois in recognizing the essential role of communications in the lives of persons with disabilities. Under the first phase of our program in Illinois, telecommunication devices for the deaf are being distributed to qualified consumers who are severely hearing-impaired, deaf, or deaf and blind.

The second phase of the program requires the provision of 24-hour relay services so that users of these devices can communicate with voice users through a relay operator.

The bill before you must also be commended for recognizing that transportation is perhaps the most important factor in accessibility. Of what use is an accessible building if person with disabilities cannot get to that building?

There will be unquestionably major public costs involved in coming into compliance with the Title III requirements for new buses, new railcars, access to stations, and general program access. But there are major public costs involved when society is not accessible for everyone. What we might call that is a "lost opportunity cost", and we see it running in the hundreds of millions of dollars. The cost of low productivity and the cost of lost tax revenue, and the continuing cost of Government subsidies to people who would prefer to pay their own way--as, I might add, they are doing in the CHIPs legislation, comprehensive health insurance, in Illinois, with a very small subsidy from the State--would work, if we would only make it possible for them.

Because equal opportunity is an American right and calls for a national policy, it also calls for a commitment of Federal funds. State and local governments are already strapped by requirements in other areas where the Federal Government has issued mandates, but given no support. It would be a cruel hoax to hold out new hope for persons with disabilities, but fail to assure them that funds are available to make sure that this is a reality. This very nearly happened in Illinois when the law creating CHIPs sat on the books for nearly 2 years without being funded. In fact, the money was obviously available. It is now funded, and the program came into existence April 1.

Speaking from that experience, and knowing that the disabled community is justifiably wary of empty promises, I urge this committee to take the appropriate steps to ensure that an increased flow of dollars for transportation services is available when the Act becomes law.

You have an opportunity to make the lives of millions of Americans fuller—43 million Americans—fuller and more productive. I urge your support for this Act and the funding necessary to make it work, and I pledge to lend any support in any way that I can. I would only ask that if possible, this Act be strengthened even further to give the attorney generals of America at the State level the right to have access to the courts on an equal basis with the United States Attorney General. We would be delighted to have the powers included in this Act so that we could initiate this action in our State courts as well, where now we are limited to the State statutes that are available to us.

So again, Senator Kennedy, my thanks for your leadership in this area and for your gracious invitation, and to you, Senator Harkin, for the work that all of you have done.

You know, when you have 43 million people who have an immense reservoir of skill and talent and experience and judgment available, if the rest of us only have the common sense to remove these stupid barriers that provide discrimination in society from giving them the opportunity to fully participate, frankly, this bill is common sense.

With all due respect to everyone else who is talking in theoretical terms—in Illinois, we have lived it. We have lived 3,000 cases so far, and we don't have to set up a whole new administrative bureaucracy, we don't have to set up access to thousands of lawsuits. What we have to do is to create an even playing field, so that in the free enterprise system that some talk of so easily, the groundrules are the same for everybody; there is no unfair competitive advantage for the hustler that wants to discriminate against the human being who has a contribution to make, but rather, the costs are the same and the benefits are the same for all business.

I regulate business in Illinois, Senator—all the franchises, 40 percent of the retail sales in our State, all the charitable trusts and foundations, $17 billion in assets—this is sound business for Illinois. It will put one and one-quarter million people fully into the mainstream of life, and I think it will be good for every State in America.

Thank you.

[Prepared statement of Mr. Hartigan follows:]

Senator **Harkin**. Attorney General Hartigan, thank you very much for your vision, for doing this in Illinois, and your compassion and understanding of what we are about here and what we are trying to do with this bill.

I must admit that prior to your testimony today, I was not aware of the things that have happened in Illinois, so——

Mr. HARTIGAN. We usually copy them from Iowa, Senator.

Senator HARKIN. I know you have a plane to catch back to Illinois——

Mr. HARTIGAN. Forget the plane. This is more important.

Senator HARKIN. I just do need to cover one thing with you as Attorney General, and because you have enacted this law in Illinois. We had a lot of discussion yesterday from some witnesses about the section of the bill that provides for certain kinds of damages. Let me just ask you a question.

Let's say that in Illinois, Mr. Jones, who is mentally retarded but perfectly capable of living independently—he can shop, he can pay for what he wants—he walks into a place of business. Let's say the owner, in front of other customers, says to Mr. Jones: "Get out of here, you retard. You belong in an institution. You make me sick. Get out of here." What recourse would that person have in Illinois?

Mr. HARTIGAN. Well, that person first of all could come to one of our offices that are located throughout the State of Illinois. We would contact the businessperson involved. We worked very closely, by the way, in developing all of our activities—we always involve business, especially the small- and medium-sized business community, Illinois retail merchants, Chamber of Commerce—they are all involved in our guidelines and the development of guidelines for our office. So we'd call the business, and we'd say, look, we've got a report of this kind of activity taking place; we want to know from you factually what took place; here is what the law is. And then we give them a choice, Senator—they can either become part of the solution, or they become the problem. And frankly, in terms of compliance, we have found in 3,000 cases that we are able to get compliance. We are able to get it in theaters, and in restaurants, in stores and everything else.

If I could just add one thing, the whole trick is to make it more expensive to break the law than it is to keep the law. The vast majority of businesspeople want to keep the law. They have just got a bottom line they have got to meet. They can't have somebody else having an unfair competitive advantage by getting away with a discriminatory practice. That is why we need teeth in the law. That is why we put the penalties in the law and the damages in the law. We don't impose them in every instance. We do it by compliance. It is common sense—and then if they won't agree with us, they won't comply when there is that kind of discrimination, we do everything we can to beat their brains out.

Senator HARKIN. So you do have damages in the Illinois law?

Mr. HARTIGAN. Yes, we have damages, yes—and we need damages, Senator, and you need them in this bill, because if you don't have them in this bill, then you are back to the Rehabilitation Act of 1973, which sounds great—everybody is for the disabled—it doesn't do them a bit of good, though, unless there is some muscle behind it. When you don't have the penalties, there is no enforcement possibility.

Right now, we can have punitive damages, we can have traditional as well as punitive damages. We can have injunctive activity. We have got a range of weapons we can use if we have to use them. But the fact that you've got it, the fact they know you are serious about it, keeps you from having to use it. We have had 3,000 cases where we haven't had to go to court.

When you don't have it—when it is just the sense of the public that we want everybody to be treated fairly—then the hustlers take advantage of the legitimate people. That is why we want the muscle in the statute. We have it in Illinois, and it should be—just as you've got it—in the statute nationally.

Senator HARKIN. And correct me if I am wrong, but the Illinois law applies damages only to cases of intentional discrimination. That is why I gave you this example, which is obviously an intentional act of discrimination in front of other people. Does it apply there, or does it apply in all cases?

Mr. HARTIGAN. Well, we think it applies in all cases. What we do is we talk to the person and find out. Obviously, from the example you gave me, that is pretty intentional. And if there was that pattern, that kind of situation, then we would make it clear that if it happened again, we were going to do everything we could to get damages and enjoin that person.

Nobody wants the visibility, Senator. If you have got the damage capability and the injunctive capability in the statute—if we say, look, you are either going to be part of the solution, and cut this out now, or you become the problem—I don't know of anybody in the State of Illinois that wants to be sued by the Attorney General—you know, "Attorney General sues the ABC Business for discrimination"—that isn't common sense, that is not good business.

Senator HARKIN. We had testimony yesterday that said we shouldn't have damages in here, and I'm glad that you say why remedies are so necessary.

Mr. HARTIGAN. It won't work without damages. And I think you will find that the business community, once they understand this—I mean, you have to have judgment on the enforcement side, obviously. But we have that. And if you don't see that emerging as the bill is implemented, then frankly, you can come back and change it. But if you start out weak, it is going to go nowhere; it is going to be a lot of good will and no change, and frankly, we need the change.

Senator HARKIN. Also, it is my observation that if you don't have the damages in there, that in fact, the cost of litigation and so on will actually increase, because people will prolong this on and on and on; but if they know that damages hang there, they are more willing to reach some kind of accommodation early on and, as you say, become a part of the solution.

Mr. HARTIGAN. Sure, no question about it. That is the traditional way of stretching out the individual. I mean, a person with a disability has got enough problems simply dealing with life on a day-to-day basis—but then, to go out and get an attorney and go through a couple years of delays and continuances and every way there is of milking the system, simply adds to the problem. No, I think this is a very carefully crafted and well-drawn statute, and I applaud the committee for it.

Senator HARKIN. The only other area I wanted to cover was scope. Should the provisions of the ADA applicable to public accommodations be limited in scope to those covered under Title II of the

Civil Rights Act of 1964, or should we cover things like doctors 'offices, shopping centers, things like that?

Mr. HARTIGAN. I don't understand curtailment in scope. I don't have a curtailment in scope. I can go anyplace I want. The whole idea of the Americans with Disabilities Act and what we are trying to do in Illinois is to create free, open, total access, so that a person's contribution to society should only be restricted by their own skill, not by anything else.

So why shouldn't it be everyplace? I mean, that's just common sense.

Senator HARKIN. Thank you very much, Neil.

Senator Kennedy?

Senator KENNEDY. Thank you, Attorney General.

I think you have made a very powerful and compelling case, based upon your own experience, and I think the points that the chairman has reviewed in terms of the importance of the availability of injunctive relief and damages are very, very worthwhile as is your own experience with it.

Of course, if you look back to the Civil Rights Act of 1964, Title II, the public accommodations provisions, did not include damage provisions, but we had other existing Federal law, specifically section 1981 that does have damages. When taken together, we were able to make progress. Those that talk about just tracking Title II of the Civil Rights Act of 1964, are not looking at is the combination of different Federal laws which included punitive damages in order to achieve a public policy outcome. And that was reaffirmed in the Fair Housing legislation of last year, where we had not only injunctive relief, but we also included the damage provisions.

I think we are entitled to have learned from past experience. I think that is part of the legislative process. We have learned what has been effective. We learned in Fair Housing of 1968 that just administrative procedures and consultation did not work, and that is why we had to take the action last year.

So it seems to me, as you have stated very well, the part of the enforcement provisions in the Americans With Disabilities Act are based upon a very sound, continuing, ongoing record and a record of history in terms of how we can really achieve policy objectives. And I think your statements and comments on that are extremely valuable in terms of practical experience.

I don't want to delay you, but perhaps you can provide us at least what you have found in terms of the numbers of cases that have arisen and how effective you have been able to be in terms of resolving some of the disputes which have come, so that we have some ability to respond to those who say, well, you passed this legislation, and we are going to find that businesses are going to spend their lives in court. We have heard that charge before; it hasn't been the case. I would be interested in whatever you might provide for the record that could address that particular issue.

Mr. HARTIGAN. Well, first of all, I absolutely agree with you, Senator Kennedy, on the growth in the process. You very carefully have pointed out the two tracks that this could have proceeded along. Going to the Fair Housing Act of 1988 was a growth process. I think that the craftsmanship that has been involved in this legislation is another step even added to that by not building in a massive administrative bureaucracy.

People talk about why we have this red tape in Government. The way you have crafted this thing, it seems to me, has created the alternative remedies that have been drawn from the Civil Rights Act and the Fair Housing Act, and at the same time there isn't the excessive burden. Nobody is trying to burden legitimate business in this entity, or anyone else, for that matter. It is exactly the opposite. It is trying to open things up in terms of creating access.

So I salute the way that this is crafted in terms of the penalties side of it.

As a practical matter, by not setting up this huge bureaucratic structure, I think you have created the atmosphere for compliance. I mentioned 3,000 cases, Senator Kennedy, 3,000 cases in a couple of years in the Illinois Attorney General's Office. We are not a massive agency. We cover 102 counties with 215 lawyers. What we do is we have perhaps a dozen advocates who are involved in disability and aging, and they sit down on a common sense basis and deal with these people. But where you have got the potential, where you have got those "arrows in the quiver", if you will, of injunction, of the penalties, then they have got some resources behind them.

What we obviously do, whether it is a restaurant or a theater or any sort of public or private accommodation, is we try and craft the solution on a reasonable basis—what is reasonable in terms of compliance. There are some that clearly, there is more cost involved, more difficulty on the funding side of it, so we set up the compliance structure on that kind of a basis. Virtually any kind of accommodation that you can consider, I think we have touched.

But one of the things we did, as you have done here, was to sit down before we drafted the Act, with the professionals in the area, the advocates who know what they are talking about. I was impressed by the gentleman's earlier testimony as far as his architectural background. We did that in Illinois. We sat down with the Illinois Architects' Association and the Building Owners 'Association and talked over with them a broad variety of different areas, how this might apply to them and how we could get their cooperation.

And I think, Senator Kennedy, in conclusion, that is the key to the thing—by making it more expensive to break the law than it is to keep the law; in other words, by saying to the people who don't care, who have no conscience whatsoever, no concern about people living a full life—they are just in it for the buck—by saying to them, "Look, you break the law, and we're going to throw the book at you", we have just reversed the economic equation. We made it more expensive for them to break the law than it is for the legitimate person to keep the law.

Therefore, we have been able to get the legitimate business community and professional community to be supportive of our activities because they genuinely operate with a conscience. They want people to have full access.

And by the way, when you are talking about 43 million consumers who, if they have full access, have an increased buying power because they have an increased opportunity to a higher level of work, and also less dependency on the tax system at the same time, that's good business by anybody's definition in this country. So legitimate business wants to support us, and they do.

And when we run into a technical question, Senator Kennedy, we ask them to come in, join us in our discussions, and we have found it to work very well. I applaud this bill, and your efforts, Senator.

Senator **Kennedy**. Thank you.

Senator **Harkin**. Let me just say right now, Neil, that I want to thank Elaine Hirsch for all of her involvement in this. I know she has been involved with my staff over the last several months, making changes and recommendations. So a lot of this mirrors, again, what you and your people in Illinois have done. So thank you very much for your office's involvement with this.

Mr. **Hartigan**. Well, thank you, Senator. I would underscore those comments about Elaine Hirsch. Elaine Hirsch—who is the lady sitting behind me with the black and yellow outfit on—I think is the conscience of Illinois. She certainly has educated all of us. She taught us what we could do in terms of the benefit to Illinois by having thousands of people as full participants who did not have that opportunity before. I feel very privileged to have her in the Attorney General's Office—she also drives me crazy once in a while, but I do what she tells me, and I stay on the right track most of the time.

Senator **Harkin**. Well, she has been a great input to us.

Senator Jeffords?

Senator **Jeffords**. I would like to follow up briefly on the positive that you ended on, which was a good way to end. I was concerned earlier about the testimony that we need the negative, we need the stick. I wonder if you could illuminate me a little bit more as to what you have done on the positive side.

In Vermont, we have been only emphasizing the positive at this point. We have gotten a large number of businesses to work on having disabled people work with them, and it has all been a very positive experience, and that number of businesses is growing each year.

What has Illinois done on the efforts on the positive side?

Mr. **Hartigan**. First, your Attorney General, Jeff Amstoy, is a very positive contributor to our national efforts, I might add.

We have tried in each of these areas to work on a constructive basis. I set up the Disabled Advocacy Division. And we have an advisory council. And unlike some advisory councils that you and I and everybody else in this room have probably been on, where they put your name on a piece of stationery, and then write a report and throw it up on a shelf, this one and the other ones in our office actually set the agenda for us.

What we try to do is we try to take the knowledge of the advocates, Senator, and empower them with the muscle of the litigator. We ask them to spell out what they felt were the things that could be done if Government were really open—if Government wanted to do things better, what is the agenda of what could be done. And we built into that advisory council representatives from all of the major advocacy groups and the professions that were affected by the subject matter being discussed. That cooperative partnership, public, private, advocate, litigator, across-the-board, works because in developing the agenda, the priorities of what can be done, we have found that in terms of implementation, once it does come into existence, that we have full cooperation from the legitimate business community, whether it is jobs or it is on the telecommunication aspect as far as telephones are concerned—that is a new statewide program in Illinois—CHIPS, Comprehensive Health Insurance, had a coalition of 210 groups. In Illinois, the doctors and the lawyers don't talk; the insurance doesn't talk to either of them—we have one of those brawls going on all the time in our General Assembly. The exception has been the disabled area. CHIPS, Comprehensive Health Insurance, brought together 210 groups of every conceivable background, on a positive nature, and we showed how it was cost-effective to bring this kind of program into existence.

So I think really, whether it is transportation, housing, employment, public accommodations—everything that is in your bill—we really have followed the pattern that I have just outlined, and it works.

Senator JEFFORDS. Thank you.

Mr. HARTIGAN. Yes, sir.

Senator HARKIN. Neil, thank you very much. Again, I know you want to catch a plane at noon, and if Elaine can drive as well as she can implement legislation, she can get you out to the airport in time.

Mr. HARTIGAN. She will scare me to the airport by noon, Senator. Thank you very much, Senator. I appreciate it. Senator Kennedy, thank you for the invitation. Senator Jeffords, thank you.

Senator HARKIN. Thank you, Neil.

I am going to ask the remaining panels 'indulgence. Our lead-off witness this morning was going to be the Minority Leader of the U.S. Senate, Senator Robert Dole. He is, as you know, an extremely busy individual, but one who has had a long interest in and support of legislation involving disabled persons.

He has some time now, and has appeared in the witnesses room, so I am going to ask him to come up and take the seat on the end which Neil just vacated, so we can have his testimony. I am sure you all understand, and I appreciate your understanding.

Senator Dole, we are honored and pleased to have you here before the Subcommittee on the Handicapped. We have discussed this legislation many times in the past, going back to last year and the original bill, and I really appreciate your coming here today to give us your thoughts on it and your views on what we ought to be doing with this legislation.

STATEMENT OF HON. ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS, AND MINORITY LEADER, U.S. SENATE

Senator DOLE. Well, first let me thank you, Mr. Chairman, and commend you for your continuing interest, not just this year but over the years, and Senator Kennedy, and Jim Jeffords on the House side.

Let me also thank other members of the panel. I won't take but a few moments, but I did want to be here, and I did want to make a brief statement. I want to thank Mo West on my staff and others who have been working on this legislation.

I don't think there is any question about what we want to do. There is no question that we need to end discrimination and need to protect persons with disabilities from discrimination in employment, education, transportation, and any other area where we have outright discrimination.

I guess my concern is the same as everybody here—how do we do it; how do we achieve these results and protect those we wish to protect in the disability community.

I think the ADA bill puts the correct emphasis on employment—that is what it is all about if we are going to get people employed and fully interated—I talk with the Secretary of Labor from time to time—not as much as Senator Kennedy does, because she is before the committee most of the time—but there is a lot of emphasis on Workforce 2000 and whether or not we are going to have people be able to meet the challenges, and certainly, a person with a disability is in that group. So employment is the right place to put the emphasis.

In my view, this is the strength of this year's version of ADA as compared to last year's, and I think we are going to be able to arrive at some agreement on this bill, maybe with modifications. Certainly, this is one area that is totally nonpartisan or bipartisan or call it what you will.

Now, we need to look at how can we proceed to achieve this and work with the Administration in doing so. I think if you ask most people in the disability community—and I don't know their political leaning, but that is not significant—I think most would say let's try to get a bipartisan bill. And I would say to this group it is a bit different than it was a year ago.

I think this Administration is more sensitive to the needs of this kind of legislation, and George Bush has said—I don't think he has endorsed this particular bill—but he has said the concept, he agrees with.

We had a meeting in my office on Friday with Boyden Gray, the President's Counsel, who has had a long-time interest in this area—it is genuine; it is not something he thought about here just recently—he has a long-time interest. We met with Chief of Staff John Sununu, Mr. Porter, and others in the White House, to see what we could do to cooperate with the subcommittee chairman and with Senator Kennedy, Senator Durenberger, Senator Jeffords, Senator Hatch, and members of the House. I know the Administration wants an ADA bill—in fact, I raised it with the President last night in a phone call; we talked some about this legislation—he wants to work with the Congress.

Now, let's face it—we've got a new Administration; some people aren't in place yet. We were told it would take 90 days—and they later said maybe 60 days—to go through all these different agencies and analyze this bill—which I think it should be analyzed; nobody objects to that. We want to do it as quickly as we can. And then, I believe the Administration—and I think Mr. Sununu passed on to Senator Kennedy—I hope he did, in any event—and others, that they are going to be in a position to offer some suggestions or modifications or whatever in order to get this bill completed. So it is the hope of the Administration—and as Republican Leader, I have certainly some responsibility to the Administration—that this is the opening round of hearings—and I have read some of the testimony, I have read some of the concerns that have been raised about vagueness and cost and other areas of the bill that probably should be addressed—but I think there is no question about it, when all is said and done, that hopefully this year there will be a bipartisan piece of legislation passed by Congress, signed by the President, and embraced by, hopefully, the business community and certainly by the disability community.

Now, I have been implored by some of my friends in the disability community that I should just sign onto this bill, and particularly since I am disabled, that I shouldn't question it. But I don't really believe that would be appropriate or that it would be wise. I certainly want to be helpful, and I do want to help this committee—and I do know who has been leading the efforts in this committee—and I am not trying to promote a Dole bill or anything of that kind. I am just trying to make certain that when we have one, it is one that we can stand up and defend.

So I favor the concept but I am somewhat cautious because I think there is some question about what some of the language does. I have talked with my staff, and we have a couple of people with me today if somebody has questions on some of the vagueness in some of the language. I read what the Chamber of Commerce had to say about some of the language. And what we are trying to create are jobs for the unemployed, not lawyers. They have got plenty of work to do around this town, in any event.

I do support the employment goals, and I would hope that we can resolve some of these areas that might otherwise lead to litigation and long delay for some receiving the benefits.

I strongly support the elimination of barriers for people with disabilities. In fact, years ago in the Finance Committee with then Senator Mondale, the two of us offered the first tax credit for removal of architectural barriers, and that has been extended since that time.

But I also care whether we go about achieving these goals in a constructive way, one that will not create an unreasonable burden on the private sector which will be required to implement the provisions of the legislation.

I firmly believe that our society will only be changed when people focus on the contributions that people with disabilities can make, on what they are capable of doing.

I have a little foundation for the disabled, and we had a meeting last week—in fact, we raised a little money last week, and we gave an award to Marriott Corporation. I am sure everybody here knows that they employ 6,000 employees with disabilities. Now, that is a record to be proud of. So I am very proud of the Marriott Corporation and others in the private sector, reaching out. As Bill Marriott will tell you, these are in many cases their best employees. They are there on time, they do their work, and they are good, solid employees. And if there is discrimination, he would be one person to stand up and say that somebody is making a big mistake in the private sector because they are discriminating against the people who will produce. I think that is very helpful.

Well, certainly, this bill before the committee is the beginning of the process, and I think it is a very significant contribution. This is a very complex issue, and I believe that the legislative process will work. I believe I can say for President Bush that he is committed to the concept and that he plans to work with us until we get a bill this year that we can all support. I think we can use this process to review the issues raised and to make sure we are responsive to the concerns of all those who will be affected.

What I hope to avoid is some of the problems we faced when Section 504 was first enacted, and there was such a long delay in implementation of the legislation; in fact, it took years.

So I would just ask that my entire statement be made a part of the record.

Certainly, this bill as it finally will pass, will be a big step toward the future. I think we have questions on some of the employment provisions—it does provide strong prohibitions against discrimination; it does emphasize a critical area of employment, and to balance this, the bill utilizes the Section 504 concepts of "undue burden" and "otherwise qualified". However, the enactment of legislation should include careful consideration of the fact that it would cover not just recipients of Federal funds like Section 504, but also many small businesses.

When we start talking about this group and civil rights protection, there is going to be a cost incurred that may not have been true in other areas of civil rights and nondiscrimination, because we are going to be placing an impact on business, and someone is going to have to pay the cost.

I believe consideration should be given to a more gradual phase-in of some of ADA's requirements. Perhaps coverage could be extended to employers employing 50 or more employees for the first three years of the Act, and lowering coverage as the private sector becomes more accustomed to the intricacies of "reasonable accommodation".

Transportation issues are another area where the balance among competing interests is critical. And although the bill would require no retrofitting, it does require that all stations in an inner-city rail system be made readily accessible not later than three years, and there could be an extension, as I said, of up to 20 years for very high cost.

One of the most critical aspects of any nondiscrimination legislation is the remedies it provides to enforce the rights. If you don't have a remedy, it is not going to work. The Americans with Disabilities Act needs strong enforcement provisions. However, it also needs provisions that are unambiguous and take into consideration both the rights of the individuals with disabilities and the rights of the other parties who would be impacted. And there are some differing enforcement mechanisms for various types of discrimination in the bill. With regard to employment, it references Title VII of the Civil Rights Act of 1964 and Section 1981. In the telecommunications section, the remedies in the Fair Housing Act and the Communication Act of 1934 are incorporated. With regard to public entities, the Act references the remedies that apply under Section 505, and this does create some confusion and not enough clarity; and more importantly, the remedies provide for actions by an individual who believes he or she is about to be discriminated against. Now, I am not certain how you would ever come to grips with that.

It is unprecedented langauge, and it could open the door to a lot of frivolous lawsuits which would not do much to advance the goals of those with disabilities.

So I would just conclude by applauding the work done on this Act and applauding the groups who have been working in the trenches for years. I know that each year, they think this year is the year it will happen. I think this is the year it will happen. With the leadership we have on this committee, I think we can reach the goals. And certainly, I want to be a positive force for moving ahead. I am not going to be an obstructionist, but I would say, as I said very candidly to Senator Harkin, that I do believe that with President Bush on record, that he deserves an opportunity to produce. And if I found anybody in the White House who I thought might be dragging their feet, I would say so. I have not found that. I think it is just a question of sort of getting their act together and making a determination as to what they can support. We may not agree with their final product; they may have to compromise more.

So I will just say I hope that I can be helpful to the committee in working with the Administration and making certain that we end up with legislation that will do precisely what Senator Harkin, Senator Kennedy, and Senator Jeffords have in mind, and that is to help those with disabilities gain employment.

I thank you very much.

[Prepared statement of Senator Dole appears in the appendix.]

Senator HARKIN. Thank you very much, Senator Dole, for those remarks and for your careful analysis of the bill. We will look at all the things that you have suggested, and we'll take those into consideration.

I know, as I have said to you personally, and I have said openly in this subcommittee, that I don't think anyone can doubt your commitment to mainstreaming the disabled in our society. I am well aware of the work of the Dole Foundation and the fine work it does in terms of promoting employment, and that is really what we are talking about here, as you said. Mainstreaming means being able to work, being able to have access to all the things that any other person has access to in our society.

We will have discussions about cost, and I may want to bring up—I don't know what your time is, but there are a lot of things that we could discuss on the cost element of it. I think there are a lot of red herrings out there in terms of cost, and we know that. In many cases, the cost is minimal to make accommodations. And as was stated so many times in our hearing yesterday, a lot of times, with just a little ingenuity, they can come up with devices or with things that just really don't cost anything.

I have a whole chart, which I don't have with me here today, but we had a receptionist who was legally blind and was about to lose her job because she was running a switchboard, and she couldn't tell which lines were on. They got her a little light probe which allowed her to determine which lines were used and which were not. It cost $45, just so she could keep her job.

A salesperson with cerebral palsy was provided a headset for a phone that allowed him to write while talking—$49.94. I have just got reams of examples like that.

So I think people think we are going to have to make all these big changes, and that is just not so.

Your comments about the Marriott Corporation and what they found with their workers really strikes home to me. My brother, who is deaf, I remember once when he was hired sort of on a "well, we'll see how you work out" basis, worked at this business for ten years—and you know what winters are like in Iowa—he worked there for ten years, and he was not late once and did not miss work one day in 10 years.

So when you say that these people are indeed some of the best employees who can be hired, you are absolutely right. I have seen it first-hand.

Again, we do want to make a bipartisan bill out of it. There are a lot of things that we will wrangle on on a partisan basis, as it should be—that is the business we are in here is to get the country running, to have open and free debate. But this is one area in which there should not be partisan wrangling; there just shouldn't be any partisan wrangling. We can fine-tune it, we can make some corrections in the bill as we go along to address certain problems that are out there. That is well and good. But I am hopeful that with your support and with the support of the Administration, it will be bipartisan.

Let me just quote what President-elect Bush said at a pre-inaugural event on January 18th. This is a direct quote from the President of the United States: "I said during the campaign that disabled people have been excluded for far too long from the mainstream of American life, and I still believe that this is an accurate statement. And I want to do what I can, working with those of you in this room who care, too, I want to do what I can to correct all of that. One step that I have discussed will be action on the Americans with Disabilities Act in order, in simple fairness, to provide the disabled with the same rights afforded other minorities."

Senator DOLE. I think I attended that meeting; was that HHS?

Senator HARKIN. Yes, January 18th. And again, that was before we had really worked over the ADA bill; it was the bill we had last year that Senator Weicker sponsored and that I was a cosponsor of, which had a lot of provisions in it that, again, we worked on starting in December, meeting with Senator Hatch, going into January, February, March, to make meaningful changes.

The original ADA bill specified that reasonable accommodations had to be provided unless it would threaten the existence of the business—the so-called "bankruptcy provision". Well, that has been changed. We changed it to the "undue hardship" of Section 504.

The original ADA required that architectural barriers be removed in two to five years unless it would threaten the existence of the business. We just changed it to the more modest requirement of requiring changes that are "readily achievable" rather than whether or not it would bankrupt the business.

The original ADA provided that buses had to be retrofitted. That has been taken out—just new buses. And we provided other alternatives in there aside from the new buses; no retrofitting is required at all.

So again, if you look at this bill that we have now, it is a much, much more modest bill than we had last year, and I think goes a long way toward addressing concerns that you had expressed even last year on the original bill. And we really do want to make all these accommodations. There may be some fine points in the bill that we may have to look at—and we will—but it was my concern—as I said, as I told you personally, we had worked on this, and as far as I know, everybody was invited to the meetings, had full access, we coordinated with them, with Senator Hatch's office, with yours, and with the Administration. And I felt it necessary that we started moving, otherwise, I know what the calendar is like around this place, and with August gone and with the other appropriations bills and things coming down, I felt it necessary to start moving on the bill——

Senator DOLE. I think it is wise to move. I think somehow, there was apparently a misunderstanding—and I don't know where it originated—that the President was going to maybe endorse the bill. And like everything else, in not quite 4 months, they don't have all their proposals put together—whether it is child care or parental-leave, or whatever the bill might be—they are functioning, but they don't have every Administration proposal put together. And I must say, I don't think they have focused a great deal on this particular area.

Roger Porter is trying to put together a crime package, child care, and several other things, and it is a very difficult thing to do. But I think by starting the hearings, you have certainly gotten their attention, and they are focusing on it. And they were told last Friday to go back to the agencies, Transportation, whatever department, and speed up the process, that they weren't going to wait 90 days.

So I don't know what the timetable is of the committee, but I would hope—I know 60 days is a long time, but I think maybe in this case, patience might be very beneficial. I think George Bush meant what he said, and he is going to keep his commitment. And I hope that it means we are going to have a good bill.

Senator HARKIN. And I talked to him last week on Thursday personally, and again—and in fact, I have always said that he did not specifically endorse the bill, but he has always support the concept of the bill, and what we are trying to do—obviously, I know he is busy and does not know every little thing in it; he is not involved in it like we are, in the drafting of it and so on, and I know that they have to review it. I am just hopeful that, with your help, we can keep them focused on it so we don't end up spilling over into next year, with all the things that may come up next year.

Senator KENNEDY.

Senator KENNEDY. Thank you, Mr. Chairman.

I, too want to join in welcoming the Minority Leader to the committee this morning and express strong appreciation for his statements and for his support. I, too, join with the chairman in recognizing his longstanding and continuing activities in support of advancing the interests of the disabled.

I had the good opportunity to attend a 1985 Dole Foundation meeting, where my son was honored by the Foundation. So I have followed both his longstanding commitment and career in this area and recognize that with his good support and help, we can advance the movement of this measure very dramatically.

And clearly, as one who has also over a period of time had a chance to talk with President Bush on this, I don't question or doubt his strong commitment.

We want to work with the Administration. It is the right way to go. It makes sense for the common cause which brings us all together. I know that Senator Harkin, who is the real leader in this area, wants to work very closely with the Administration. We feel that it is important to go ahead with these hearings now, in May. We want to indicate that as they do their review, we welcome at any time during this process, during the 60-day process, any suggestions or recommendations, all of us do. We certainly want to have the Administration's input.

As the chairman has pointed out, we can help advance this, and because we have ideas here in this committee on parental leave and day care and other items, if the President's wants to raise some of those as we spend time on this one here, we will move it forward.

But in a serious way, we are grateful for your support. I certainly believe the President is committed. I think it is reasonable to permit review, but what we want to do as we go through is ventilate what are the major areas. And I would hope, Senator Dole, as we come to grips with some of these major areas—scope, for example—as someone who has been very involved in the civil rights movement—in Title II, we dealt with public accommodations; we opened up theaters, and we opened up restaurants. But we now recognize the importance of opening to people with disabilities all facilities that are open to the general public. We have made progress, but it is one thing if you open up theaters and restaurants, but it if it closed for dry cleaners and supermarkets, you are not really opening it up. So we just take that concept of public accommodation and say we have grown from the time that those civil rights laws were passed, and now we know that "open to the public" extends to these other common areas—and the enforcement provisions as well. We have heard our good friend, Senator Hatch, who has spent time in both of these areas, in civil rights as well as employment, talk about scope.

If we just take a narrow concept of what scope or enforcement provisions are, you may find some differences. But the general educational and historical progress that we made has, I think, been embraced in this, and has been done in a way under Senator Harkin to really address what I consider to be the areas of greatest concern in terms of the costs and other matters, that are frequently used in exaggerated ways to try and slow down the possibilities of this legislation.

So, as someone who has spent time and recognizes the progress that has been made in the civil rights area, I would hope that we can work together on a bill that is worthy of the efforts that so many have made.

I would finally just say that we are going to move ahead with these hearings, but I do hope we will be able to get the suggestions of the Administration and certainly have those considered and have early action on this legislation.

Senator DOLE. If I could, I might say to the chairman, I have indicated to the Administration that as they—say they get a report back from one of the agencies—they ought to bring that up to the committee right away, and not wait for everything to come in. They may have some very reasonable, relevant objections, and they should be called to the committee's attention. And I was advised that that would be done.

Senator **Jeffords**. I certainly also want to thank Senator Dole for being with us today, and I know I speak for Senator Hatch and Senator Durenberger when I say we are anxious to work with the Administration and yourself to ensure that we can remove some of these difficult problems that are now facing us with respect to remedies and scope and transition, costs, and all of these things. And I would hope we could do it reasonably quickly, especially those that seem to emphasize negative rather than the positive aspects of the bill.

I would just dedicate myself to working with you and the others to see that we do that as quickly as possible.

Senator **Dole**. I told the White House I would be happy to raise some of their concerns today, but they were not in a position from Friday until today to come up with anything that I thought would merit raising this morning.

So I appreciate what the chairman has said, Senator Kennedy. I hope they can speed it up even more, but when it is all done, they ought to be onboard.

Senator **Harkin**. Just in closing, I jotted down one thing you said on "about to be discriminated against". We went all through that aspect, and in the bill what we tried to do, Senator Dole, was to try to take language that has been time-tested, been through the courts, and people understand what those words and phrases mean. That language is directly from the Fair Housing Act that we passed here last year—you were a leader in that—so we are just adopting language that we have already acted upon here, so that everyone knows what it is.

We tried very hard to avoid any kind of new language that would open this up, as you said, about all the lawyers out there. And I must admit to you that I am a little concerned about some of the things I heard yesterday, that we are finding a lot of things coming in that raise these issues up that aren't really real issues, because we have settled those issues before here in other legislation.

So I think the burden is on those who say that we ought to have a different standard than what we had under the Fair Housing Act or under Section 504 or under 1981—the burden is on them to show why the disabled community should be different than everybody else in terms of that language.

So again, I hope we can have an open-door policy, and we will talk to one another about these things as they come up, because I am a little concerned,just from a few things I have heard—these little things keep popping up which we have settled here before, going back 20-some years, that have been settled language. And I am concerned that if we change it now, then what it does is it makes the disabled different than minorities and other people under our civil rights bills.

Senator **Dole**. Right. We have all been around long enough to know that some people are just opposed to anything, and they are going to raise every possible objection. And the objections that are raised in this case, as in other cases, ought to be constructive. I mean, there may be areas where we can find a solution, but I think I can assure you that the White House will let us know what they have in mind. The President is pretty much on record, and you just read a pretty good quote.

Senator HARKIN. I think so, and I appreciate it.

Thank you very much, Senator Dole.

To the panel, you have been very kind and considerate.

We have heard from Ron Mace and Mr. Ball, and we will now be happy to hear from Sally Douglas. Again, thank you for your patience, and please proceed.

Ms. DOUGLAS. Mr. Chairman, thank you very much for providing NFIB the opportunity to participate in these hearings.

For those people who might not know who NFIB is, it is the National Federation of Independent Business, and we represent over 570,000 small and independently-owned businesses across the Nation, of all different types, ranging everything from manufacturing to nonprofessional services. Our average member has 13 employees and grosses $350,000 annually.

I appreciate the opportunity particularly to come in and discuss the proposed ADA with you, because it is indeed landmark legislation and because the bill will directly affect so many more small businesses than have ever been affected directly before.

We sincerely appreciate the opportunity to discuss some of our concerns. I am afraid some of those concerns will be identical or similar to the little things that the chairman just referred to that "keep popping up", but from a small business context, we want an understanding on both sides as to the practical implications the bill will have on the small business community.

I am not a civil rights expert; I am not even an attorney. I am speaking in terms of the concerns that small business have with legislation that will affect their day-to-day operations.

I should also say up front that no one would deny or should deny the right of every American to have the opportunity to realize his or her full potential; nor should we deny any American all rights to conduct their lives in reasonable manners. Achieving the proper balance between the rights and needs of persons with disabilities and the rights and needs and resources of American businesses is a challenge that we face, and I believe we can succeed if we can work together.

Integrating persons with disabilities into the mainstream of American life is indeed a challenge. We have been successful in some instances and not in others. I would like to state for the record, however, that although I do not deny that discrimination exists, in fairness, not everyone, not even all business owners, willfully and intentionally discriminate against the disabled. This fact needs to be recognized and understood, for I believe it is key to accomplishing—all of us accomplishing—the worthwhile goal of providing opportunities for persons with disabilities.

We have been asked today to focus our comments on Title IV of the public accommodations section, and I would ask that my entire written statement be inserted into the record, and I will highlight some of the points that I made in that testimony.

The ADA in providing equal protections for persons with disabilities requires, in some cases where necessary, specific restructuring of architectural and communication barriers, removal of transportation barriers, provision for auxiliary aids and services, and the like. All of these requirements would incur financial costs of varying amounts—some of them small, and some of them could be quite substantial for a smaller business.

In addition, the firms would be expected, at least as I read the language of the bill, to provide different accommodations to overcome different disabilities. I should at this juncture also say that a point that might not be well-recognized is that many small businesses do not own their physical facilities; they rent or lease from other sources. That brings up the question of it physical modifications are needed to the facility, is the business owner at fault or the building owner. It is question, given the language of the bill.

The language would demand in effect that all business owners be prepared for all contingencies, since the bill affords protections to all customers, clients or visitors who are persons with a wide range of disabilities and indeed goes further in terms of defining businesses as potential places of employment, so presumably, all these businesses would also be required to accommodate persons with disabilities, even, as I read the language, when there is no disabled worker requiring such accommodation.

What is being asked of small businesses is that they perform structural modifications, buy special equipment, where merited provided qualified interpreters, readers, tape decks and the like, other effective or alternative methods to deal with persons with varying disabilities—whether or not any persons make contact with these businesses. This is, I do not believe, the intent of the sponsors of the bill, but this is as the legislation reads at present.

Business owners will be perceived as discriminating against persons with disabilities not only if they willfully exclude such individuals, but if they fail to make the modifications or provide the services required in Title IV—unless, of course, they can demonstrate that modifications would, as the language of the bill states, "fundamentally alter the nature of such privileges, advantages, and accommodations," or they can show undue burden, which, in the case of a small business, is going to be a little different than in the case of a larger business, or that removal of architectural and communication barriers is not readily achievable.

I would say on this point that I commend the chairman and the other proponents of the legislation for making some very good changes from last year's draft. The bankruptcy provision obviously upset quite a few small business owners, and we appreciate that change.

What alternative methods would be, if one could not achieve standard methods, I would assume, would be decided on a case-by-case basis. It might include such items as a business initiating home delivery of goods and services if the business simply cannot retrofit the facility to overcome barriers. The question that came up is what does a business owner do if, as a potential employer, the place of business which, say he rents, cannot for one reason or another be modified; he wants to hire the disabled worker, and because of the nature of the job and because of the equipment that is available and our technology, the person with the disability can work out of the home. Does this or does this not contravene the requirement in Title I, that an individual with a disability must be afforded, and I quote, "an equal opportunity to attain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs." This is a legitimate question, and I hope you think this through, because at least in the case of the small business sector, the revolution in terms of the workplace is occurring more and more, and we will see more of it in the next 20 years. Facilities are getting smaller, and more and more people are working out of their homes. That is not an integrated setting in the traditional sense, but it will provide some alternative needs of hiring and being able to realize the potentials of disabled people.

The business owner is subject under the dictates of the bill to the same requirements and enforcement procedures whether discrimination is intentional or unintentional and, since Title IV defines a business as a potential place of employment, presumably the owner is also subject to the prohibition in Title II against potential discrimination—that is, the claim of a person with a disability that he or she is about to be discriminated against.

I listened very carefully to your comments, Mr. Chairman, about the words "potential discrimination". I would disagree in effect that all people understand it. Because this bill covers so many businesses that have never been covered before, there are quite a few people who will have to learn what is intended by this language.

All of this is pretty daunting to some of the small business owners we represent, but the enforcement procedures contained in the bill raise even more serious concerns. As many witnesses have noted before, there are different remedies contained in each title of the bill, and access to multiple remedies seems to be assured.

I have already stated that a concern of ours is that there is on distinction made between acts of intentional and unintentional discrimination. There is also nothing in the bill to suggest that first-instance violations will be treated any differently than pattern-and-practice violations.

I listened very carefully to the comments from the Illinois Attorney General, who has had practical experience in the area, and I guess in my concluding remarks, I would say that if this legislation is passed, I would hope that the language of the bill enables us to create the same kind of climate that appears to exist in Illinois, where every effort is made to find conciliatory approaches, to think the best of everyone, and bring the affected parties together in some sort of settlement procedure. As Senator Jeffords said, in Vermont, the emphasis is on positive approaches, and I would encourage this, because I think it will stand us all in better stead.

Thank you very much, Mr. Chairman.

Senator HARKIN. Thank you very much, Ms. Douglas.

[Prepared statement of Ms. Douglas appears in the appendix.]

Senator HARKIN. Let's hear now from Malcolm Green.

Mr. GREEN. Good morning.

My name is Malcolm Green. I am from Boston, MA, and I am the Chairman of the Board of Directors of the National Association of Theater Owners. We are the largest association of motion picture theater owners in the world. We represent over 12,000 screens in the United States, including the largest circuits and hundreds of small independents.

The motion picture theater industry has been and is dedicated to being a leader in providing access for the disabled to its public facilities. NATO, as we call it, has prepared a written statement which has been submitted for the record. I would like to extend our remarks to provide the members of this committee with some of my experience in operating theaters for more than 40 years.

I have been in the motion picture theater business since 1946, starting as an usher, working my way through the process, and eventually cofounding Cinema Centers Corporation, which grew to 111 screens in New England, New York State, West Virginia, and other States from time to time.

Last year, more than one billion Americans went to the movies. We at NATO are very proud of this fact. Our company has consistently and constantly sought feedback from our customers. We want to know whether they liked the movie that they saw; we want to know if the theater was comfortable, if it was clean, if the patron had any complaints, if he was served properly by our staff.

To serve our customers better, we developed a system using comment cards. Patrons were asked to complete these cards and mail them back to us. Each response was carefully scrutinized. All of our theaters—none of which are more than 15 years old—were constructed to provide wheelchair access for disabled persons. We have never, to my knowledge, received a complaint from a disabled person that our theaters were inaccessible or inhospitable to their needs.

To provide some perspective, in Massachusetts, 10 theaters totalling 53 screens, and all with provision for access, completed an industry study on attendance by patrons with crutches, walkers and wheelchairs during March 1989. During this time period, average attendance for these theaters was 65,807 per week. Of this number, 114 were mobility-impaired persons, including 38 wheelchair persons, 48 with crutches, and 28 with walkers. Mobility-impaired persons approximated less than two-tenths of one percent of total patrons during this time period.

No matter the numbers. We are happy to have the patrons. But we must keep in mind their numbers when we adjust our requirements.

As an individual and as chairman of NATO, I support legislation guaranteeing disabled persons access to public facilities and access to jobs. At the same time, we must be reasonable. In a theater, wheelchair patrons must be seated either in the front or the back of the theater. To seat a wheelchair patron in the middle of the theater would create obvious safety problems in the event that there was a need to empty the theater quickly. State fire marshals have constantly and consistently taken the position that wheelchair patrons should be seated either in the front or the back of the theater, in close proximity to an exit.

Motion picture theater staff are trained in the event of an emergency to quickly assist disabled individuals. This task would be impossible if such individuals were seated in the middle of the auditorium.

Although all the theaters that we have built in the last 15 years are or should be accessible, I note that certain inner city theaters built many years ago may not have such means of access. Some of these theaters are in depressed areas and are struggling to stay open. They are of marginal profitability, but serve as a focal point for entertainment in their communities. Any new legislation enacted should recognize that it would be impossible to invest the capital necessary to bring such facilities into compliance with a law requiring total access for the disabled. Such facilities should be exempt unless and until they are totally renovated.

Similarly, elimination of job discrimination on the basis of disability is a concept that must be supported, but within reason. In a motion picture theater setting, certain types of disabled individuals could obviously work in many jobs. Other disabled individuals could not. The physical limitations of existing theaters would prohibit utilizing wheelchair persons to operate projectors. Projection booths, located above auditoriums, in relatively limited space, require climbing steep stairways for entrance. Projectionists must lift heavy, wide platters of film, which again would be impossible for many persons with certain disabilities.

Recently, a California commission specifically exempted this job classification from the requirement of the California anti-discrimination statute. While I don't want to appear negative about this, I must urge the committee to recommend legislation that is reasonable in scope and does not place unreasonable or undue burdens on employers.

Finally, I wish to comment on the concept of punitive damages incorporated in the enforcement section of the statute. If discrimination occurs, existing law permits class actions where appropriate. Actual damages would be sufficient to encourage litigation. The proposed legislation is exceedingly broad, and in many areas will include novel concepts that will need to be explained in detail by regulations. Any regulations that are to be applied should actually result in more jobs and more use of public facilities for the disabled to satisfy their intended purposes.

Thank you.

Senator HARKIN. Thank you, Mr. Green.

[Prepared statement of Mr. Green appears in the appendix.]

Senator HARKIN. Next, we will hear from Bob Burgdorf, representing the National Easter Seal Society.

Welcome.

Mr. BURGDORF. Thank you, Senator Harkin.

Senator Harkin, Senator Kennedy, Senator Durenberger, I am Robert Burgdorf, Jr., and I am one of 11 vice presidents of the National Easter Seal Society. Easter Seal is one of many, many national organizations of people with disabilities or serving people with disabilities who are fully behind and endorse the passage of this bill.

Prior to working for Easter Seals, I worked at the National Council on Disability, and had the very high honor of drafting last year's version of the bill, about which we have heard some today. I wanted to say that as the author of the previous version, and with all the changes that we have discussed, I have no hesitancy at all in endorsing this bill as a very strong and effective measure that is fully consistent with the intent and spirit of last year's law, and perhaps has some more pragmatic approaches that will hopefully lend to wider support.

I am here today to talk about public accommodation. Nearly three decades ago, in 1960, four black college students sat down at a Woolworth's lunch counter in North Carolina and ordered a cup of coffee, and they refused to leave until they were served. They had no idea that their presence there was going to begin a whole avalanche of protests, demonstrations, and other activities to challenge the segregation of those types of facilities.

The ultimate result of their activity was Federal legislation. One portion of the 1964 Civil Rights Act, Title II, addresses and prohibits discrimination in public accommodations, and it applies to a broad range of public accommodations, including hotels, motels, inns and other lodging establishments; it applies to lunch rooms, restaurants, cafeterias, soda fountains and other facilities where food is served for consumption on the premises; and a variety of places of entertainment—motion picture houses, theaters, concert halls, sports arenas, stadiums, and so on.

As we sit here today, those same establishments which are prohibited from discriminating on those other bases can continue to openly and blatantly discriminate against people with disabilities.

Today you have heard the people who have suffered such discrimination talk about the things they have faced. You heard Lisa talk about being ousted and not allowed to return to a movie theater simply because her disability is not one that is pleasant to the owner of the theater.

But I wanted to talk for just a minute about the breadth of the problem. It is not simply these isolated individuals. It has had a huge impact on the disabled population.

In 1986, Louis Harris & Associates did the first ever nationwide poll of people with disabilities. Among other findings, they discovered that people with disabilities are a singularly isolated and secluded population. Let me just mention a few of the findings of that poll.

Nearly two-thirds of all disabled Americans never went to a movie in the past year. In the full adult population, only 22 percent said they had not gone to a movie in the past year. Three-fourths of all disabled persons did not see live theater or a live music performance in the past year. Among all adults, about four out of ten had not done so. Two-thirds of people with disabilities never went to a sports event in the past year. Only 50 percent of other Americans reported that they had not.

Disabled people are three times more likely than nondisabled people to never eat in restaurants; 17 percent of people with disabilities never eat in restaurants compared to 5 percent of nondisabled people.

The poll found similar problems in regard to grocery shopping and other similar activities. A much higher proportion of people with disabilities never shop in a grocery store. Thirteen percent of people with disabilities say they never go to a grocery store, compared with only 2 percent of the rest of the population.

But why don't people with disabilities go out and about and engage in the same activities? The poll also lent some ideas on that score. The Harris organization asked questions about why people's activities were limited. The answer that they got was that people with disabilities are made unwelcome. The first reason reported for not going out was fear—fear of how you will be treated. The second reason was self-consciousness-the way others will respond to your disability.

Four out of ten said that inaccessibility of public buildings and facilities was the reason that their activities were limited.

So, as a society, people with disabilities have been told: You are not welcome. Sometimes it is explicit, as with Lisa and the theater manager telling her don't come back; other times, it is built into the environment—it is the flight of steps that the person with disabilities cannot get past, cannot go to complain to the management because they cannot even get into the building.

What this bill does is very simple—we lawyers can complicate matters and make it very complex—it simply says that henceforth, American society will be equally open to all. It says that when we construct new buildings, we shall no longer be allowed to intentionally build in barriers to a foreseeable group of people who will not be able to use it, who will be completely ousted from those facilities.

We have talked some about Title II coverage, and it is broad in a certain context, but it doesn't cover the same things that this bill does, and there are several reasons for that.

This bill takes a very broad concept of public accommodations, meaning places that are open to the general public ought to be open to people with disabilities as members of the general public.

Title II was designed to deal with the worst problems of discrimination that were faced in 1964. It chose to attack segregated hotels, motels, inns, restaurants, et cetera—places where the sit-ins had been occurring.

Secondarily, people with disabilities are facing discrimination in those places, but also in other places, and the concept of public accommodations is one of places open to the public. I think this bill takes a very informed approach in trying to address that. But secondarily, it just doesn't make sense. There is no sense to having certain facilities that are more needed by people with disabilities be closed off, when other facilities are open to them.

For example, it makes no sense to bar discrimination against people with disabilities in theaters, but not in shops; or restaurants, and not in stores; or by places of entertainment, but not in regard to such important things as doctors' offices. It makes no sense that you can't be discriminated against on the basis of your disability of you want to buy a pastrami sandwich at the local deli, but that you can be discriminated against next door at the pharmacy where you need to fill a prescription. There is no sense to that distinction.

So I would urge the committee to use the broad definition of public accommodation and to understand that that is the only way we are going to get the message across to people with disabilities and to the business community that they can no longer build in barriers nor discriminate against people through their intentional acts and other types of discrimination that they may engage in inadvertently.

I finally wanted to say that the standards of this bill are not that onerous. We have heard some discussion about cost. The basic premises of the Americans with Disabilities Act are that you don't have to do it if it is too difficult.

For new construction, you do not have to make changes that are structurally impractical. For alterations to buildings that are being conducted otherwise to existing buildings, you have to include accessibility to the maximum extent feasible, but if it is not feasible, you are not required to do it. For existing buildings, existing structures, you only have to make those changes that are readily achievable.

The archetype that I often like to talk about for that concept is the single step into the Safeway. Doesn't it make sense to require the ramping, at the cost of a few hundred dollars, of a single step that will allow people with disabilities full and equal access to an existing building?

One of the disturbing things I have heard sitting up here as a panelist was the description by other panelists of the lack of contact—the fear that we are going to require requirements of nondiscrimination against businesses that have no contact with people with disabilities. To my mind, that is the exact heart of the problem. Why don't those businesses have contact with people with disabilities? We are talking one-fifth of the American population. Why should any business be able to say that it has no contact with people with disabilities?

The answer is that those businesses, those places of public accommodation, have made people with disabilities unwelcome. And I think that the basic concept of this bill, and one which all Americans ought to endorse, is that we are putting up a sign that says "Welcome to America, all people with disabilities, and all other Americans."

Thank you.

Senator HARKIN. Thank you. That was great testimony.

[Prepared statement of Mr. Burgdorf appears in the appendix.]

Senator HARKIN. I am going to have to impose on the panel again. I do have some questions I want to ask you, and I do want to hear from Dr. Sharon Hughey. I know you have come here, and I do want to hear from you.

But I have got a family here with a couple of little babies, and I am going to try to accommodate them because they are getting anxious to get out of here. Knowing kids, I can't say that I blame them.

So I am going to ask the Corey family to come up, and we will hear from them.

Do any of the other panelists have a plane to catch or something that you have to get out of here for? If you do, you can be dismissed and go ahead; otherwise, if you could wait here for another ten minutes–would that be okay? I have some questions, Ron, on architecture I want to ask you.

Mr. MACE. Fine.

Senator HARKIN. Then I'll ask Mr. and Mrs. Corey to come up and Ilene Foster, from Baltimore, Maryland.

Now we're all settled. All right. We have here with us today Betty Corey and Emory Corey from Baltimore, and Ilene Foster, from Baltimore. Welcome to the subcommittee, and thank you for your patience. I wanted to get you up here because I see the kids are getting a little anxious to get out of here.

Please proceed with your testimony.

STATEMENT OF BETTY AND EMORY COREY, ACCOMPANIED BY ILENE FOSTER, BALTIMORE, MD

Mr. COREY. Thank you, Mr. Chairman.

My name is Betty Corey and my husband Emory and I are foster parents to these babies, who are HIV-positive.

We were previously foster parents to an AIDS baby for two and a half years, and Kedra died last July, two weeks before her sixth birthday. At the time of her death, we had considerable difficulty finding funeral homes that would provide a decent service and burial.

We have five children of our own, from 23 to 39, and only one is still at home. My husband is retired from the Navy, and he works the night shift with the Library of Congress police. We live in Baltimore.

Our decision to take our first little one, Kedra, occurred while I was working at City Hospital in Baltimore, as a unit clerk in the Pediatric Hospital. Kedra was born July 26, 1982 to an i.v. drug abuser. She tested positive for AIDS at the age of nine months, the first pediatric AIDS baby in the State of Maryland.

The first three and a half years, she spent in City Hospital, because there was no home. I retired, and we decided we would take her home with us—after a lot of red tape, mountains of red tape; we had to fight to take her home.

She went home on Saint Patrick's Day 1986 and did attend school for almost a full year. In May of 1988, Kedra went into total liver failure, and we realized there was nothing else we could do, and we asked to just bring her home, keep her pain-free, and she lived 66 days after that.

About a week before Kedra died, we decided to begin making arrangements for her funeral and burial. I was a member of the Baltimore County Task Force on AIDS, and at one of our meetings, the president of the Funeral Directors 'Association was there, and I realized at that time we were going to face a lot of discrimination. We began to make phone calls, and we were turned down. They either would not take her, or they would not offer the full services they offered anyone else.

At that time, I got so upset that I called Ilene Foster, who was the coordinator for the AIDS program in the county of Baltimore, and she made phone calls for me. It took 26 phone calls to 26 different funeral directors before we finally found one who was willing to take our baby and bury her.

We were given all kinds of stories. They would not embalm her. They would take her only to the crematorium. It would have to be a closed casket; there would be no viewing. I even had one who told me he would not accept her because we had her at home, and we would not properly bag her to protect his employees.

Mr. Charles Zyler willingly and compassionately agreed to bury her, and we will always be grateful.

One who was willing to take her wanted an extra $500 because of her diagnosis and told us if we allowed an autopsy, it would be significantly higher.

Soon after Kedra passed away, doctors called to offer their condolences, and Dr. Ruff, one of the doctors at Hopkins, said, "You know, we have a little one here, and we wish"—and I could not say no. So we brought Tee home, and a week later, we brought Tia home; and then in December, we brought Tiffany home. So we now have three little ones. They are seven months, eight months and nine months old—almost triplets, but not quite.

I would just like to say that these children have to fight to live, and I don't feel they should have to fight for the right to die.

Thank you.

Senator HARKIN. Mrs. Corey, thank you very much for being here today. That is a very powerful statement, and you have shown what it means to be compassionate and caring and kind and loving. We don't use those words around here very much anymore.

Senator Kennedy?

Senator KENNEDY.. Thank you very much, both of you, for being here today and sharing this experience. We are always extremely reluctant to talk about health problems in our families, as part of our nature, and I think your willingness to come here and share this experience with us is something that is enormously important. Recognizing the difficulties you may have in coming here and sharing it with everyone here today, I think the one thing we can do is to try and meet the particular challenge which you have put to us so that it doesn't happen to other families, and that is what we are going to do.

Just a few questions. You have a number of other children, do you not?

Mrs. COREY. Yes, we have five of our own.

Senator KENNEDY. How did your other children react to all of this?

Mrs. COREY. Our four youngest children are very supportive, and they worship all of them. Unfortunately, our oldest daughter, from the day we brought Kedra home, has not been in our home nor has she allowed our grandchildren to visit.

Senator KENNEDY. So four of your children have been very supportive. I think that is something that is a wonderful indication of what you have meant to their upbringing for many, many years.

As I understand, Mrs. Corey, you made a number of calls to various funeral directors, did you not?

Mrs. COREY. I made three—this was just a week before Kedra passed away. We had her at home the last 66 days, most of the time comatose. And I was so upset with people telling me this, and when the last one told me that I wouldn't have her "bagged" properly, I then called Ilene, and Ilene made the rest of the calls.

Senator KENNEDY. That must have been a rather devastating conversation.

Mrs. COREY. It was horrible. We had fought discrimination while she was alive, and I did not expect to face that kind of discrimination at death, too.

Senator KENNEDY.. Do you fear that a similar circumstance might occur with these other children as well?

Mrs. **Corey**. As long as Mr. Zyler is in business, I don't think it will, but if I had to go elsewhere, I am sure it would.

Senator **Kennedy**.. That is something that you think about, I am sure, too, and that the family thinks about.

On the hopeful side, I think we are finding out more and more medically that in a number of instances, even though the infants test positive at an early age, that that may very well be the result of their mothers 'antibodies on the test, and whether it will be there in terms of when they get older, we really don't know; no one can really say that medically. So that is something that we should not lose track of, and that is certainly something that we all hope for.

I understand that the Maryland State Board of Morticians does not consider it unprofessional conduct in the practice of mortuary science to refuse to embalm bodies dead of infectious communicable diseases. It seems to me to be certainly in conflict with the National Association of Funeral Directors, who say, "the funeral director should provide services, including embalming, for those who prior to need or at need arrange a funeral for an AIDS victim or a victim of any other contagious disease."

So hopefully, the national view would prevail. It is certainly unfortunate, the current view of the board of funeral directors in Maryland; I know this is of great concern to Senator Mikulski, and to all of us.

I will just say that your own story is the most powerful. You have obviously been extraordinary parents for your own children, and you certainly set a standard for us as common humanity to deal with this issue, and you show, by your example, what hopefully we can achieve in the legislation. Unfortunately, we have to legislate in some of these areas, because we don't have families all over the country like you.

I want to just thank you very much for coming here. I know you have gone to a good deal of trouble.

Do you want to introduce your children, there? I think that is probably why they are chirping up.

Mrs. **Corey**. Yes. This is Tia, and she is eight months old. She rules the house.

Senator **Kennedy**. She looks like she could handle this committee as well. [Laughter.]

Mrs. **Corey**. Tee is nine months old, and he has already cultured positive in his own right, so we pretty well know what his prognosis will be.

Tiffany is the baby; she is seven months. Tiffany weighed a pound at birth, so she is doing super great. She just came off her heart monitor, so I did not have to lug that with me today.

Senator **Kennedy**. Have they had their lunch yet today?

Mrs. **Corey**. Well, their whole schedule is off today, so they're not too happy about it.

Senator **Kennedy**. Well, we thank all of you very much for your patience.

Senator **Harkin**. Mr. and Mrs. Corey, and Ms. Foster, thank you very much. You have renewed my faith in humankind.

Just to think that here are kids who, through no fault of their own, have tested positive for HIV, and yet we know from all of the medical experts in this country that there is absolutely no way that you are going to get HIV from these kids; absolutely none.

Mrs. COREY. That is true.

Senator HARKIN. And yet the fear that is out there among people because of the aura, the stigma that goes along with that. It is like when people used to have leprosy, and people would not associate with lepers. But we found out that indeed you could live among them, work with them, just as you can with HIV-positive kids.

We have just got to break down these fears, we have got to break down these barriers. That is what this legislation is designed to do is to help try to break down these misunderstood fears that people have. Through your example, I think you are doing a great job in breaking down those fears. You are to be commended.

Mrs. COREY. And we hope others will take these children in, because there are many, many waiting for homes.

Senator HARKIN. I am sure that Mr. Ball would join me in saying that these are really true Christians, without a doubt.

Mr. BALL. Yes, I do indeed.

Senator HARKIN. Thank you very much.

Mrs. COREY. Thank you.

Senator HARKIN. Dr. Sharon Hughey, you have been very, very, very patient; all of you have been patient. I intended on calling on you when we finished the regular panel, and then we had Mr. Hartigan, then Senator Dole, and then the Coreys. I hope you will understand that sometimes these things happen. I appreciate your patience.

I know that you also had a statement with Mr. Ball, and we would certainly appreciate hearing from you now anything that you would like to tell the subcommittee.

Dr. HUGHEY. I am assuming there is a mike here, okay.

Mr. BALL. Yes, it is right here.

Dr. HUGHEY. Senator Harkin, you have been known as a friend of the disabled for a long time, and I commend you for your commitment to ensuring that the rights of the disabled are enforced.

I can remember sitting, talking with some people about discrimination on airplanes, and they were saying, oh, this bill—there is something going on with Senator Harkin—and I thought oh, good, good. I did not know what it was—that was a long time ago.

I am extremely pleased that a bill of this nature is being considered. However, I find myself in the awkward—very awkward—and, I think, very unfortunate position of being unable to support this bill in its entirety as it now stands.

Predominantly, I have two concerns. The first has to do with the definition of disability, which I really do find a little too broad and inclusive. For example, I have trouble——I know, in my own research, I certainly have trouble—in terms of thinking of drug addiction and alcohol as disabilities in the classic sense of the word.

I do not feel that a religious institution should be forced to hire or keep in its employ someone who is currently taking drugs or abusing alcohol, whether or not his or her ability to teach is affected, not because per se they are taking drugs or alcohol, or even because they are "disabled" in that sense of the word—but because such behavior itself is in violation of the moral code and doctrinal statement essential to the very existence of that institution.

A Christian school should not be allowed to terminate the employment of someone with AIDS, not because it is AIDS, and only if it was contracted as a result of homosexual behavior or intravenous drug use, because these behaviors are in violation of the moral code by which anyone who applies for such a position would normally agree.

Forcing Christian schools or churches to begin or continue employing those whose moral behavior contradicts the teachings espoused by such organizations is religiously discriminatory, and I don't think anyone here would want to replace one kind of discrimination for another.

Laws requiring Christian organizations to hire people who do not adhere to the doctrines of such organizations are in violation of the First Amendment. No institution should be forced to hire people who cannot agree with its statement of faith or conduct.

My second concern has to do with the issue of Federal funding. Christian institutions which do not receive Federal funds should not have to comply with extremely burdensome Federal regulations. Most Christian schools operate on tight budgets and do not have the Federal funds available to them which would assist them in making architectural changes necessary to comply with this bill.

I was interested in the gentleman's testimony to my left, about cost, and I can't wait to get my hands on that stuff, because I'd like to see how we could reduce costs. Forcing them to comply means discrimination against people who use these organizations, by virtue of the fact that such schools would be forced to close if they did not have the money necessary to comply. They could state that such compliance would mean financial hardship, but my concern is regarding the regulations that would be written by the different agencies that would enforce this part of the law. And I am concerned that the regulations, not the law itself, but the regulations would be written in such a way as to make it impossible for them to get exemption.

Most Christian schools do not have money to hire enough staff to give disabled students the educational opportunities enjoyed by other students. I am thinking here predominantly of extra aids and things of that nature.

I do believe that wherever possible, Christian schools and churches should do everything within their power to serve the disabled. However, forcing them to make expensive changes without providing funding for them to do so is religious discrimination, because it forces them to close their doors, or at least puts them under great financial strain. The parents who pay taxes for public schools also pay tuition for private schools, and these schools rarely receive any benefits from the taxes parents pay.

In view of these areas of concern, I recommend that you reconsider inclusion of religious schools in the Americans with Disabilities Act of 1989. Such institutions should make every effort to assist the disabled without being monitored by the Federal Government whenever such methods are financially responsible and/or would not contradict the moral code or doctrinal statement of such institutions.

The major reason Christian schools were created in the first place was to provide education that included spiritual and moral components not available in the public school. Insisting that these institutions conform to standards for public schools—and I am not talking about disability standards now—well, in a sense, I am, but I am commenting more on the religious aspects—insisting that these institutions conform to standards for public schools reduces them to privately-funded secular institutions, and in a sense, then, ~~we are~~ back to where we were when we first created them.

I have demonstrated for the rights of the disabled for a long time; I have been active as an advocate for a long time. My dissertation was on attitudes toward the disabled. And I commend this committee for the consideration of such a bill, but I do have some reservations about the scope of agencies covered.

Private schools, religious schools, are not "available to the public", in quotes, in the sense that most people in the public are not going to want to go to them, because if they don't believe in what they stand for, they are not going to want to go.

So those would be the two points that I would want to make at this point.

Thank you.

Senator Harkin. Dr. Hughey, thank you very much. I appreciate your being here today and your testimony.

I am really running out of time now. We have been informed we have to vacate the room for another hearing, and I did not know that.

First of all, let me ask Ms. Douglas—I want to get to this thing about cost and architectural barriers. On page 7 of your testimony, you state that Title II of the Civil Rights Act requires acceptance as its standard of accommodation. You then state that the ADA requires much more, requiring costs of varying amounts, some of which could be substantial particularly for small businesses.

Let's explore that point. Let's start with architectural barriers. Witnesses here today have testified that the additional cost of making new construction accessible is negligible.

Would you agree that——

Ms. Douglas. Yes, I would agree with that, Mr. Chairman. I think it is an easy matter to adapt new construction.

Senator Harkin. So you think that it would be appropriate to require that new buildings be accessible.

Ms. Douglas. I think that in accordance with what Mr. Mace was talking about earlier, that the technology exists; that it is a matter of architectural design, and when you have the ability to plan for those changes, then I don't see a significant impact in that sense for new buildings, not at all.

Senator Harkin. Let's put that aside and talk about renovation. First of all, I want you to know that I represent a State that has a lot of small businesses.

Ms. Douglas. Absolutely.

Senator Harkin. And again, we have to be careful about weighing things and making sure that we don't drive them out. Let's talk about renovations. Let's say you renovate your building in a manner that affects accessibility. Is it reasonable to require that the renovations require accessibility features to the maximum extent feasible?

Ms. DOUGLAS. Not to beg the question, but what exactly does that mean—in terms of your explaining that to the average small business owner in Iowa, what is he or she to understand by "maximum extent feasible"——pertaining to their business, pertaining to a general standard for an industry, for example, or for a State?

On the surface, no, I am not going to argue the question. But as someone on the panel said, lawyers have a tendency to complicate matters that should be simple. It can mean different things to different people.

Senator HARKIN. We had in the bill last year that they had to retrofit unless it caused bankruptcy.

Ms. DOUGLAS. That's right. And as I said, I commend you very heartily for that change.

I think that you have done in this bill is to try and bring into conformity with existing standards, as you yourself have said, that at least some of the people who have been affected by this kind of legislation before are more familiar with, are more aware of, there is case law providing, et cetera, et cetera—and those changes are good.

My only point in this, Senator, is that because the scope of the bill is so much larger, there is essentially an entire group of businesses out there that are, for want of a better word, ignorant of the interpretations of case law and of existing civil rights protections, because they have not been directly affected. That is the concern I am trying to express.

Senator HARKIN. I am trying to segment it into three parts—new buildings—and we have talked about new buildings—now I have talked about renovations, where you come in and make major renovations—I am not talking about renovation just to make them accessible; I am talking about someone who is doing a renovation of a building, and they are putting in new doors, new windows, new stairs, new this and new that; they are renovating a building. That is why I am talking about making it to the maximum extent feasible.

Ms. DOUGLAS. The only significant problem I could see in that kind of an instance is because of the fact, as I noted before, that so many small business owners do not own their physical facilities, that if——

Senator HARKIN. Well, it would be the owner; the owner of the building would be required, if the owner were renovating—I am just saying that we are not forcing them to renovate. We are just saying that if they are renovating.

Ms. DOUGLAS. If you are going to renovate, I do not see why, if current technology allows you to do it, if there are accessibility standards that can be followed, why you could not. Again, the concern is that the language of the bill satisfy the intent and that it be clearly understood by a group of people who simply have not had—I don't want to say need—but they haven't had a real good reason to know the ins and outs and the particulars.

Senator HARKIN. Let me ask Ron—you have been involved in this—what does that mean to you, to the maximum extent feasible, which are the words that would be used to strengthen the bill?

Mr. MACE. I think it means a variety of things, almost on a case-by-case basis, because in renovations, there are numerous things that everybody can do—they are simple, they are inexpensive, they require a maintenance person. There are things that you can do in the course of doing your remodeling.

I think there need to be some criteria for those things that would be done all the time, and I think realistically, in some remodeling—well, let me put it this way. In new construction, I don't see any reason for not having 100 percent, every area, every square foot of every new facility, with very few exceptions. In remodeling, I think there are going to realistically be some areas that you are going to put a severe cost on some people to do. You may be renovating a theater; that example was given earlier. I would say it is extreme to require someone to put an elevator in a renovation of a theater to carry someone to a projection booth.

It is not extreme to say that, on the contrary, a projectionist could be a mobility-impaired person, who walks, who can climb stairs, and he needs a handrail that is appropriate on that same stair that goes to that room—and it should be done, because it is not an extreme.

There are judgment calls that have to be made on every one of those projects.

Senator HARKIN. Again, we cannot write in legislation—we just cannot do it——

Mr. MACE. No, you can only write the intent.

Ms. DOUGLAS. But you can make these kinds of things clear in legislative history. That is the point that we are trying to make.

Senator HARKIN. That is why we are here. That is exactly what this process is about, is trying to make that legislative history.

Ms. DOUGLAS. Yes, absolutely.

Senator HARKIN. And I am trying to make it clear, also, as my next couple of questions will try to make some legislative history, also.

Let's talk now about existing facilities. Is it appropriate to require retrofitting of existing facilities to make them fully accessible?

Ms. DOUGLAS. All facilities?

Senator HARKIN. All.

Ms. DOUGLAS. I would have to say no. We can run up against some real, real obstacles there, some real problems.

Senator HARKIN. If it is too expensive to retrofit—and I agree with what you just said, by the way, on retrofitting—but if it is too expensive to retrofit, is it appropriate to require that the services or the goods made available to nondisabled people by that business entity be made accessible using alternative means, whatever the cost—whatever the cost.

Ms. DOUGLAS. Let me sort of back into this. In my testimony, I specifically mention as an alternative method in those instances where the facilities simply cannot be made accessible, that certain businesses, retail establishments, for example, et cetera, could institute a home delivery program for customers who cannot enter the physical facility.

Some companies could do that, and some companies could not. Again, you do not have a homogenous composition in the business community. You have some businesses that are extremely marginal in nature; you have some that are doing quite well, and everything in between.

As I assume the legislation is written, these kinds of things would also, in fairness, have to be decided on a case-by-case basis. I simply do not see, as you said before, how you could itemize various and sundry alternative methods to cover every particular contingency. It would look like a tax reform bill.

Mr. BALL. May I add to that comment, Senator?

Senator HARKIN. Yes.

Mr. BALL. Senator, when you come to the religious schools, the thousands of religious and churches throughout the United States, when we talk about cost, we are talking about a make-or-break factor, a live-or-die factor. In the case of the schools I represent, this is absolutely true.

I heard Attorney General Hartigan say that we need Federal funding under this bill because State and local governments are already strapped. Well, if they're strapped, what about the small religious schools? They do not have the means.

There is another matter that is connected to that. We are very, very concerned that the bill accomplishes a real precedent in transforming not only religious schools, but churches, into places of public accommodation. This is a critical objection that we have to the measure. We do not know whether, when the courts eventually look at this bill, if they do, they will say that you never intended to have this apply to religious schools and churches.

The problem is that it is also possible to read your bill as saying yes, indeed, it does.

Now, if it does, if you really intend this to apply to churches, then I think you ought to be right up front with it, and say so, and let, then, the churches in the United States respond one they know that that is the true intent.

Now, one other aspect of enforcement and the related problem. I would be very happy if I were, like Ms. Douglas here, with you out in Iowa, dealing with an enforcement problem. You'd talk about "reasonable accommodations", and you would be reasonable. We would talk about other aspects of the bill, or of the application of the Act to a particular school, and I would feel confident about your own intentions.

The problem is that when you nationalize legislation, you are coming into myriad situations in which government agents will make their own judgment as to what is enforceable or not, as to what is reasonable or not, whether the accommodation is reasonable, whether in his judgment or her judgment, you can do it or you cannot.

This gets us into obvious vagueness in the bill, but that vagueness is necessary. The problem is when you don't——

Senator HARKIN. The courts make those decisions.

Mr. BALL. Well, we do not want to see this come into the courts. We think you ought to make up your minds as to whether churches and religious schools are included or not. We think they should be excluded from the bill, because we think they are distinct entities, Constitutionally distinct entities, Constitutionally protectable entities, which do not represent any kind of major public threat such as many other institutions do.

You asked me, Senator—and this is my last remark—you asked me after the Coreys testified—and that was beautiful testimony—but I was surprised at your question to me: You would agree, Mr. Ball, that these are good Christian people.

Sure, we would; marvelous people. We have nothing—our schools have nothing but compassionate interest in disabled people. I know that our schools practice the example of the good Samaritan day in and day out. We are all for nondiscrimination in every form against the handicapped.

We are simply saying that we are not a business, we are not an industry, we are not one of the myriad public institutions that has adequate sources of funding. We have just enough to make it, to provide quality, good education for kids. We are doing that.

We beg that this bill be so amended as to exclude churches and religious schools.

Senator HARKIN. Why were you surprised at my question?

Mr. BALL. Well, it seemed, Senator—and maybe I am misreading your question—but it seemed to me that you might be reflecting upon, or having in mind, a somewhat media-produced image of Christian schools, which have been, I think, sometimes defamed in the media as being narrow, reactionary, et cetera. These are not.

Senator HARKIN. Let me reassure you, the reason I asked you that question is because you are the only person at the table who is representing a distinct Christian entity——

Mr. BALL. Well, thanks.

Senator HARKIN. If you were a minister or something, I would have said the same thing, because you have a distinct reason for sitting there today. And I said that to you because you are here representing Christian entities——

Mr. BALL. Unfortunately, I am only a lawyer.

Senator HARKIN.—nd being one myself, I asked you if you would agree that this truly is a Christian attitude that they have and example that they are setting—there was nothing more intended other than that.

Let me just finish the question with Ms. Douglas, because I had a point I wanted to make for legislative history purposes.

I asked you about existing facilities, and I asked is it appropriate to require retrofitting of existing facilities to make them fully accessible. You said no, because obviously that would be prohibitive.

Then I said, well, if it is too expensive to retrofit, should we then require that the services or goods be made available regardless of the cost. Well, we can't do that, either.

Ms. DOUGLAS. No, we cannot.

Senator HARKIN. Then, is it appropriate to do nothing?

Ms. DOUGLAS. That's a good question.

Senator HARKIN. I hope the answer is no, it is not appropriate to do nothing.

Ms. DOUGLAS. I think that again, since in several other instances you are trying to establish a standard of wherever feasible——

Senator HARKIN. But is it appropriate for us to sit and do nothing?

Ms. DOUGLAS. In what context—overall?

Senator Harkin. For existing facilities, to say we don't care what your situation is—you don't have to do anything to make it accessible.

Ms. Douglas. Well, but in the context of the entire building, it is not that you are not doing nothing—you are establishing certain standards—Title IV, if you want to take the narrow focus——

Senator Harkin. What I am drawing is two extremes. I drew of the extreme of doing everything to make everything fully accessible. But on the other hand, I said we can say if it is an existing facility, you don't have to do anything—even if it might be putting a little ramp that might cost you ten dollars just for a wheelchair to get over a hump to get over a store, you don't even have to do that, because it costs you ten bucks.

You see, what I am trying to point out is that there are extremes.

Ms. Douglas. I understand.

Senator Harkin. And what we are trying to draw here is an appropriate one—to require modest expenditures to provide an opportunity for a disabled person to be able to get access to a store or other public accommodation so that they can pay their own money for goods or services. That is the alternative that we take in this bill; it strikes a reasonable balance between the rights of the disabled and the rights of small businesses. It is that view of to the maximum extent feasible.

We have numerous examples and cases of what people can do to make modest improvements and modest changes. Ron Mace has a whole list of things; he must have about 30 of them that he never talked about, but——

Ms. Douglas. And I believe, Senator, that in trying to answer the question that you gave me, I began to say that you are trying to establish a standard of what is feasible, and I have no problems with what is feasible.

Senator Harkin. What is readily achievable.

Ms. Douglas. Or what is readily achievable. Again, we were specifically addressing the alternative methods portion of that, and my only caveat to that is that it would, in effect, have to be decided on a case-by-case basis.

Senator Harkin. Well, it is going to have to be. I mean, that's just the way things are going to have to be done, because again, reasonable accommodations are what we are after here in existing facilities. No one wants to bankrupt anyone, but we do want people to be sensitive to this and to begin to think about how could they make their store or their business more accessible—with, perhaps, the smallest amount of cost. It could be just, as Ron talked about, putting offsetting hinges on a door, which gives you an extra couple, three inches. I know what that is; I do a lot of carpentry work. That is a small item to do to put an offsetting hinge on a door, but it may mean the difference between whether a person in a wheelchair can get in and out of a doorway or not. Those are the kinds of things we are talking about.

Ms. Douglas. And I would say in the instance of anyone who intentionally and willfully refused to do that kind of thing, that there should be no protections for that person; that person should be subject to punishment for taking that attitude.

My essential problem with the bill, Senator Harkin, is that there is no distinction made between that individual, who has a rock-ribbed prejudice and acts out of discrimination, and the small business owner, who may be only guilty of not thinking about this.

Senator HARKIN. That is what we call sort of "benign neglect". No, they aren't overtly discriminatory, but a lot of people maybe have not come in contact with persons with disabilities; they don't know what to do.

Ms. DOUGLAS. Yes, I think that is quite true, and even some who have are still not quite sure what to do in all cases.

Senator HARKIN. I agree with that.

Ms. DOUGLAS. It is a learning process for both sides. And that is why it is important that people be educated, that we get over the fear and the ignorance.

Senator HARKIN. Let me just tell you a problem I have, and I have been through this for years, now. This bill is the result—this did not just take us a week or a month—in fact, read the bill drafted last year.

Ms. DOUGLAS. I did.

Senator HARKIN. That was drafted by President Reagan's handpicked committee; it wasn't me, it was not social tinkerers who were doing this—these were people in the business place, these were businesspeople, the mainstream of America, who drafted that bill.

Now, we are trying to make these accommodations, and what frustrates me is that we are trying to take a reasonable approach on this, and some people say, "You are being too strict."

Ms. DOUGLAS. I don't believe at any time during my testimony I said that NFIB opposed your effort.

Senator HARKIN. No, no, you didn't say that. I am just concerned that issues are raised—and these issues ought to be raised so we can make the legislative history clear on it—I am just concerned about little points coming up that we just cannot answer each and every little thing in legislation. We can set policy. We are policymakers. We try to get the tone through, make the legislative history, so people have some reasonable basis on which to go.

Ms. DOUGLAS. And that is essentially what we are saying. I know that you cannot fashion a piece of legislation that answers every consequence that would occur on any bill. But what I think we are all trying to do here is to indicate that a substantial legislative history, a careful airing of the issues and a record of these issues and what was discussed and what was decided will help in interpretations of the law once it is enacted.

Senator HARKIN. Did you have anything else, Ron, that you wanted to say about this while we are talking about accommodations and so on?

Mr. MACE. Yes, I do. I think the difficult issue here is communicating what we mean in some really understandable way. We mean a variety of things in reality. I agree you cannot put this into the legislation—I think it is interesting and important to note that those little things that we are talking about here that can be done, that are no hardship on people, are the things that get done all the time. Most businesses are doing this when somebody goes to them and says, "Would you do this, could you do this?" If the local mayor's committee puts on a campaign to get some businesses to make their facilities more accessible, they generally get good cooperation. It is people and people who make it work, who go out there and say, "We need this. Is that reasonable? Can you do that?" I think that is what will continue to happen and will be amplified by the ADA. It will call attention to it and say this is important enough for it to be the intent of Congress for the whole Nation to take this approach to it, and then the mechanisms have to be local, they have to be States, they have to have people who negotiate on what those things are. And there may be some high limits to that; I think there are some guidelines that might be established that would say there are these mileposts or these few points where it may be getting close to an edge, where you have some limit.

But it has got to be on the little things, individual, and good intent and good will.

Senator **Harkin**. And let me just say again that with passage of this bill and with, I think, the kind of message it points out—and you heard me say earlier today—that one of the points of the bill is to sensitize people, to get them thinking about this if they are not thinking about it now, to begin asking their own questions, like, "What can I do to make my place more accessible?" Certainly, that is one of the real thrusts of this legislation, which brings me to Mr. Green and your testimony on theaters.

At the bottom of page 7 of your testimony, you say that, "buildings should not be made accessible unless it can be shown that facilities will actually be used by a reasonable number of people".

You talked about the two-tenths of one percent of people who go to the theaters who are handicapped. But now you have heard Mr. Burgdorf's testimony. Handicapped people do not go because they are afraid; they do not go because of what happened to Lisa. Do you think she is going to go to that theater again?

I will tell you, if you start making them accessible, you will see a lot more handicapped people in your theaters.

Mr. **Green**. Senator Harkin, first, with reference to Lisa, I gave Lisa's mother my card and asked her to contact me regarding that specific instance, which I am sure is an isolated instance of someone who was nettled, for whatever reason—but that is certainly not the policy of theater owners——

Senator **Harkin**. I don't think you want to say that in this room.

Mr. **Green**. Okay.

Senator **Harkin**. Mr. Green, I can tell you, having two members of my family who are handicapped, that it happens every day—in little ways, maybe not as blatant as that, but it happens in other little ways, you know. And it has happened so often in a handicapped person's life that only the strongest are able to get through life with any semblance of balance, any semblance of a balanced outlook on life. I can tell you, it is one of the most debilitating things that you can imagine. And I think perhaps only minorities, maybe blacks and others who have really suffered from abject discrimination, understand really, fully, what it means to be handicapped and what those instances of discrimination mean.

They will go to your theaters if they are open, I'll tell you, and you will make more money, because they will come.

Mr. GREEN. Oh, I am perfectly aware, and I would like to have that to serve the people who are not coming.

Senator HARKIN. Sure. But right now they just think what is the use of even going there.

Mr. GREEN. With reference to the bottom of page 6, that was concerned with theaters that had to have substantial renovation, and those were theaters that were not renovated before and that are older theaters and that we have asked to be exempted, because in general, those theaters are ones that are being phased out throughout the industry. That's what it has reference to, nothing else.

All new theaters today are constructed with wheelchair access, and there is a trend toward devices to help the hearing-impaired, and all sorts of things that the industry is very much in favor of and trying very hard to get implemented everywhere.

My only reference there was to older theaters, which are slowly but surely being replaced by newer theaters, or the owner of that property has to make the decision whether it would be totally renovated. And I submit that once it is totally renovated, or they begin to renovate it, they have got to take care of these problems, and they have to have accessibility; no question about that.

We are all in favor of that in the industry.

Senator HARKIN. Well, I just want to point out that in terms of what you said as to the fact that not very many people use it—we have to question, well, why is it——

Mr. GREEN. I understand what you are saying, but the specific theaters that we picked in Boston to make that survey were all modern theaters, built very recently, with excellent access. And I do know that people will hesitate to go in because of past experience, but all I can say is that it will take us a long time to change their perception of what it is, and we'll do the best we can. There is no question about it.

Senator HARKIN. Let me just finish on this one point. On page 3, you talked about the older theaters in inner cities, and they cannot easily be modified.

Mr. GREEN. Yes.

Senator HARKIN. You said such facilities must be exempt from this bill unless and until they are totally renovated. But again, the standard set up in the bill, as Ms. Douglas and I just talked about, is "readily achievable".

Mr. GREEN. Readily achievable, no question.

Senator HARKIN. So they don't have to close their doors, they don't have to make these major expenditures; it is just whatever might be readily achievable.

Mr. GREEN. I think we understand each other. When I referred to that before, I talked about total accessibility, and a ramp can do it, but it may not bring anyone up to the balcony if there are such theaters remaining, which there are very few of.

Senator HARKIN. In fact, reading over your testimony, it almost reads like you are talking about the bill we had last year, seriously. I invite you to look at the differences in the two.

Mr. GREEN. Okay. Thank you.

Senator HARKIN. Senator Durenberger, you have been very kind and very patient.

Thank you.

Senator **Durenberger**. Thank you.

I have just been sitting here contemplating how far this making of legislative history is going to take us during the course of this bill, and I admire your stick-to-it-iveness.

I need to ask some questions of the representatives of ACSI. I am going to be on the Floor one of these days on the ABC child care bill, arguing that when Government decides to make child care easier to obtain for Americans, that Americans ought to be able to use Government assistance or tax-paid assistance to buy child care in any setting in America, whether it is a Government setting, a private setting, or even if it is a Christian setting or a Jewish setting, or whatever.

So I read the written statement of ACSI with some chagrin and some desire not to make the legislative history here today that is going to affect this other effort on my part.

I seem to have found in the written statement every conceivable argument why an educational institution, if it is owned and operated and totally controlled by a religious organization, ought to be exempt from the provisions of this Act, and by implication, then, as I look over some of these arguments, exempt from—perhaps at the choice of the institution——a lot of other acts.

I see language in here that refers to "a high majority of religious schools are church-operated. They are inseparable and integral parts of the church entity and would have no existence except as such." What happens then if we carry this out to its definitional extreme.

The whole conversation here about adequate sources of funding. If we adopted that as a notion or a premise, I do not know where we would draw the line. I need a little help, I guess.

There are two objections, as I understand it. One is as to the breadth of the definition of "public accommodation". The second is the moral right to make certain decisions about who is involved.

On the first, I guess it is pretty clear to me on the religious side that, as a Catholic, I wouldn't want the law in this country to require that the current civil rights legislation be used to require female priests. I happen to think the female priest is a good idea, but the Pope doesn't, and the rest of my church doesn't. But I do not want the law here, Tom Harkin, or anybody else telling me that I've got to accept female priests. So I think that is an illustration of religion.

But when we move over to the other activities that may be sponsored by that religious sub-entity, whether it is education or child care, it seems to me we have been setting a fair amount of precedent in this country already. Take the asbestos regulations, for example—do we want Christian kids who go to the Calvary Church to be inhaling asbestos that was put in a long time ago and dying of lung cancer? And even though the costs are incredible to take that building down and put it back together and get rid of the asbestos.Just because the Government alerted you to the problem, and just because the Government helped you discover that there was a problem, do we want the kids at Calvary Church to be exempt from these requirements?

Can you help me explore that issue a little more? How do we draw the distinctions here?

Mr. Ball. Well, I'll try, Senator. On the nature of the schools I represent, they fall within the definition and the lengthy commentary that the Supreme Court has given in cases such as*Lemon v. Kurtzman, Meek v. Petinger, Walz v. Tax Commission,* and so on. They fall within a definition of schools which are an integral part of the religious mission of the church. Eighty percent of the ACSI schools are church schools.

The Supreme Court has warned repeatedly against what it called excessive entanglements of Government with religious schools, and that has cropped up in a number of ways. A famous regulatory case is *NLRB v. Catholic Bishop of Chicago.* There, in Illinois, and certainly in Pennsylvania, we had the effort of NLRB to exert its jurisdiction over religious schools, and the NLRB argued, as governmental entities often do, that, well, the Act speaks of "employer". Now, isn't the school, or the pastor in the Philadelphia case, isn't he the employer? So therefore he is under the Act.

When the Supreme Court got that case, they searched very carefully to discover the intent of the Congress, and the Supreme Court said unless you have the intent affirmatively expressed to put NLRB jurisdiction over the religious schools, that jurisdiction cannot exist because of Constitutional considerations—in other words, getting Government intrusively involved in the affairs of the religious school.

Now, the ACSI schools do not desire to be any part of a governmentally-subsidized operation, whether in the child care area, or for their elementary or secondary schools or colleges. The position they have taken on the child care front is that they support an amendment or a bill such as Senator Holloway's, which would admit tax credits to parents and not subsidy to schools, so that the parent—as in the *Whitters v. State of Washington* case—the parent is given money which the parent can expend for that or can expend for public facilities.

So the other problem we have had with the ABC bill is precisely the problem that we have here, in that it puts Government very heavily in a position of control of religious schools.

All right. Now you come to your asbestos problem. The asbestos problem is nothing like this problem. It is not a good parallel at all, Senator, if I may say so. Asbestos is an extreme situation, posing immediate and specific danger to children. And of course the schools have observed requirements which would take care of the asbestos problem.

Here, however, you have a whole overlay of regulation dealing, among other things, with job scheduling, with the employment situation within the schools. I have mentioned the very strong moral objection we have on the alcohol and drug abuse situation, and I have mentioned a related moral problem. But in addition to that, we are again into the problem of all the minimal things that the Senator was just asking Ms. Douglas about which, however, is left to the discrimination of the enforcing officer, who then can say, well, I am not satisfied with your putting a doorstep somewhere else, or putting a little ramp over a doorstep; I think the whole front end of the building should go. It is that accordion-like power, that blank check——

Senator Durenberger. Thank you very much.

There is a lot to explore here, but I think what you have done is confirmed for me what I read in the statement, which is what I wanted you to do.

The second part of the question relates to the moral aspect, and perhaps the Chairman and the staff can help us both out here in terms of what ADA really does or does not do.

What I read from the statement is that ACSI schools do not and will not employ any users of alcohol or drugs, irrespective of any question of abuse.

Mr. Ball. Right.

Senator Durenberger. That means no one can be employed by any of these schools if they admit that they consume any kind of alcoholic beverage; is that right?

Mr. Ball. That is correct. You know what we mean. We are not talking about alcohol that might be contained in the medicine—we are not talking about "paruna" of an earlier day; we are talking about beer, wine, liquor, gin, vodka, et cetera.

Senator Durenberger. I see. And that is basically what, a religious or a——

Mr. Ball. Absolutely, oh, yes. We can prove that out at length.

Senator Durenberger. All right. Suppose a person comes to you, then, seeking employment and says, "I am an alcoholic, but I have just celebrated my third year of sobriety."

Mr. Ball. This would be obviously a moral judgment that the school administration would make. I am sure the administration would not hold it against the person that they had reformed their lives, even though the reformation came from an alcoholic. I cannot answer that question because I am simply a lawyer, speaking for a client. That is a moral judgment that the school would have to make.

Senator Durenberger. I think your client made some reference to this earlier, and I am left a little vague about whether or not your church considers the acknowledgment of chemical dependency by a person who also claims to have been free for "x" period of time to be a disability or not.

Mr. Ball. Well, I think that we have stated all that we can in our testimony on that score, Senator. I think the broad outlines of principle that I stated there are unassailably clear. The judgment that would be made in a particular case—and here again, you see, when you put Government into the position of saying, well, we think—we, the Government, think—that this individual, who was an alcoholic, should have been hired or should not have been hired, when the Government then begins to involve itself in these moral judgments, which are plainly called for by the application of the sections we are talking about, then the Government is way out of its proper circuit.

The sensible thing in this legislation is to simply clearly express the exclusion of religious schools. But if you want to include churches and religious schools, then don't leave it vague; stick it right in there and tell the United States we are going to apply this to churches, spelled out in letters in the bill, and religious schools. Then we can have a public debate that is meaningful.

Senator Durenberger. I just have a couple of concerns. One is that, Government is society——

Mr. **Ball**. We agree.

Senator **Durenberger**.—nd there are a lot of people out there who would set Government up as something separate and apart from society.

But on just the issue I was talking about in terms of chemical dependency, when society begins to come to judgment on this, Government will in one way or another reflect that in its policies; I am confident of that. Government is not going to create something that does not exist.

But having said that, I think the concern of those of us who sit up here and try to reflect what is the best policy for the society is the protection of this thing we have in America, which so many other people do not have, and that is the guarantee of religious liberty.

Mr. **Ball**. Yes.

Senator **Durenberger**. And if someone is going to take that protection and involve that in the environment, in education, in transportation, in all of that, and say I am a religion, and because I am a member of a religious body you cannot do this to me, or you cannot do that to me, you society cannot say this, you society cannot say that. That my guess is probably why you are here today, and that is why you are going to get a lot of concern expressed as you try to stretch *Kurtzman* and the rest of those cases to cover a variety of conclusions that society is coming to about the civil and human rights of members of our society.

I am not trying to be judgmental in that statement. I am just trying to tell you that I believe that there is so much value in the Constitutional protection of religion in this country that we have an extra special obligation when we are departing from the actual worship and the expression of the religious convictions and beliefs and start moving into the other related, but different, services, whether it is education or whatever; that you can only carry the protection of the religion so far. That is apparently what we are very carefully doing here in the drafting of this bill—that is the very careful line everyone is trying to draw.

Mr. **Ball**. Yes, I think that is true. ACSI believes profoundly in the common good. It does not seek to say that we are a law unto ourselves, and the common good can be put away.

Senator **Durenberger**. I do not know if you were here yesterday, but I asked Tony Coelho the question about persons with AIDS and the relationship with the *Grove City* case. Because you can say you don't put yourself above the law, but I've got a State and a political party full of Christians who are putting themselves above the law all the time, and they are trying their best to pin me down as somebody who is violating their religious rights. So there are—and I am not speaking for Tom Harkin—but those of us who have been in the political arena in the last few years have found nowhere other than among certain Christian groups so many people who try and put themselves above the law. And maybe that is why you get some of these questions with a little feeling.

And I know those people are trying to be sure that we draw appropriate lines.

Mr. **Ball**. Well, "put yourself above the law", of course, is a phrase that can apply to many situations and many people. In the civil rights movement——

Senator **Durenberger**. But starting with definitions of morality is usually the place you do it, because you put morality above the natural law. You get to be the judge of what is moral, and you get to incorporate that into your religious beliefs, interpreting it for a variety of people.

Mr. **Ball**. Well, that is the nature of our society; it is the nature of our Constitutional Government, that people can indeed advance, and at times must say that their religious conviction comes first. But every American can do that on the basis of secular convictions or religious convictions.

Senator **Durenberger**. We are one of the few countries in which you can do that.

Mr. **Ball**. Let me, if I may ask—and I think it is important to ask—does this bill cover churches and religious schools? Does this bill, the ADA, cover churches and religious schools?

Senator **Harkin**. Yes, it does.

Mr. **Ball**. Thank you. I simply wanted to know——

Senator **Harkin**. Under Title IV, it does, under Title IV.

Mr. **Burgdorf**. Senator Harkin, could I add a clarification? I am afraid that what happens when we say "churches or schools" is that we get a bunch of things—pardon the pun—but balled together.

The churches are covered under Title IV if they are places that are open to the public. It is a different question under employment. And I think a lot of the examples that Mr. Ball has been using are employment examples.

In the context of employment, you have to be an otherwise qualified individual with a handicap——

Senator **Harkin**. That's right.

Mr. **Burgdorf**.—nd it is entirely possible that relationship to a religious doctrine that is truly held in a particular religion does relate to your qualifications for the position.

Most of what we are talking about isn't that. Most people with disabilities are not being subjected to doctrinal types of beliefs. They are being kept out by things that are built into the environment, or by attitudes that Tony Coelho was describing, that "We won't have a person with epilepsy in our priesthood."

So it is not simple: Are churches covered. They are covered in certain ways, and they are not covered in certain other ways.

Senator **Harkin**. Exactly right. In fact, if you will read the bill—I will explain that—we have a religious exemption in the bill. There is a bona fide religious exemption in this bill just as there is in the Civil Rights Bill of 1964. Mr. Ball, you know that as well as I do.

Mr. **Ball**. Yes. However——

Senator **Harkin**. Let me just finish. There is a bona fide religious exemption. Let me just ask the question. Are bona fide religious institutions precluded by the ADA from imposing qualifications based on religion when such qualifications are related to a bona fide religious purpose? The answer is no. Any bona fide religious institution may continue to impose qualification standards based on religion when such standards are related to a bona fide religious purpose.

That is exactly as it is in the Civil Rights Act. So they do have a bona fide religious exemption under the bill.

Now, when you ask are they covered, and I said yes, I want to be honest with you that in terms of Title IV, yes, they are. But now let me ask you, since I was forthright: In your opinion, is it appropriate for the Federal Government to adopt a policy saying that private schools must admit black qualified applicants?

Mr. BALL. There is nothing that we object to in that—if by "qualified", you mean religiously qualified. The doors of a Catholic diocesan school or an ACSI school or a Lutheran school or a Seventh Day Adventist school is clearly entitled to reject an individual on religious grounds.

Senator HARKIN. That's right. But again I ask is it all right for the Federal Government to say that you must admit black qualified students if they meet your criteria.

Mr. BALL. Yes, religious criteria.

Senator HARKIN. The Federal Government has said that.

Mr. BALL. Yes. We have no problem with that.

Senator HARKIN. Okay. Then, why shouldn't the same policy apply to people with disabilities?

Mr. BALL. We haven't a problem with that except——

Senator HARKIN. Well, that's what this bill does. That's exactly what this bill does.

Mr. BALL. No, I am afraid it does not, Senator.

Senator HARKIN. Tell me how it doesn't.

Mr. BALL. This bill first of all defines a religious school as a place of public accommodation. Now, I haven't heard any comment on that from Senator Durenberger or from you, and this is a terribly important point. It is immediately placed in a category which it has never been placed in previously in any Federal legislation. It is not considered a place of public accommodation until this bill.

In public accommodation statutes in various States, an exception is made for distinctive private entities. And Pennsylvania courts, for example, have held that religious schools fall under that exception. They fall under that exception, and for a very good reason. They are not like a movie theater, they are not like a public school.

Senator HARKIN. Would it help any if we rewrote it and said, "churches, private schools and places of public accommodation"? Would that be all right with you. Then that would not put you as public accommodation, but it would spell out churches, private schools and places of public accommodation.

Mr. BALL. I'd certainly want to consider that, Senator. I——

Senator HARKIN. You might want to consider that, because that may answer your objection on the fact that it is not a place of public accommodation.

Mr. BALL. What you have just said doesn't account for the other matters to which we have testified in the bill. For example, our problem respecting the moral issues of which Senator Durenberger was talking, the matter of alcohol and drug abuse—that is not covered, that is not satisfied by the amendment which you had just proposed, Senator.

Senator HARKIN. That's a religious exemption.

Mr. BALL. Pardon me?

Senator HARKIN. That is a religious exemption.

Mr. BALL. You think it comes under that. That——

Senator HARKIN. Listen, let me just repeat again that the ADA bill does not create any rights or protections against discrimination on the basis of sexual preference. Thus, a covered entity is not precluded by the ADA from discriminating against a person solely on the basis of, let's say, homosexuality. The bill is modelled after Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act as recently amended. These statutes have never been interpreted to afford homosexuals protection from discrimination. So there is that religious exemption.

Mr. BALL. From what are you reading, Senator? What are you reading from now?

Senator HARKIN. It is a question-and-answer—what I am reading from is the interpretation of the bill, in terms of making certain that you understand that there is a religious exemption for that purpose.

Mr. BALL. Right. Now, what was that document, because I am not familiar with it?

Senator HARKIN. You don't have to worry about that document; that is just my own questions and answers. That is an answer that I had written up in answer to a question——

Mr. BALL. That is your answer to those questions.

Senator HARKIN. Then people say, "Does your bill cover homosexuals? Do I have to hire a homosexual?" And I am saying no, you don't, because they are not covered under the ADA bill; that is not defined as a disability.

Mr. BALL. Will this be now made a part of the record?

Senator HARKIN. It is right now; we've got a record.

I am sure I will talk about it on the Floor, too, because this will come up on the Floor, too. But I think there is a lot of misunderstanding about this and what it covers and what it doesn't cover. You have made one suggestio that we may take to heart. You think about it, and come back and let us know. We might want to just put in "churches, private schools and places of public accommodations" if you object to being included under the "public accommodations" sort of umbrella like that, because then churches and private schools will be treated the same under this bill as it is under the Civil Rights Act, exactly the same. There would not be any difference whatsoever.

So maybe you have enlightened me a little bit on the public accommodations aspect. Maybe that is the way we might want to go on that. You think about it and let us know on that.

Mr. BALL. Indeed I will. Thank you very much, Senator.

Senator HARKIN. OK, thank you.

Thank you all very much. I did not intend for it to be a marathon session.

Our last panel includes Paul Taylor, National Technical Institute for the Deaf; Robert Yaeger, Minnesota Relay Service; and Gerald Hines, AT&T.

Again, thank you all for being here and staying for this great length of time.

We will start with Paul Taylor from NTID. Paul, welcome, and please proceed with your testimony.

STATEMENTS OF PAUL TAYLOR, NATIONAL TECHNICAL INSTITUTE FOR THE DEAF, ROCHESTER, NY; ROBERT YAEGER, MINNESOTA RELAY SERVICE; AND GERALD HINES, DIRECTOR OF SPECIAL LONG DISTANCE SERVICES, AT&T, BASKING RIDGE, NJ

Mr. Taylor [Orally interpreted from sign]. Thank you, Mr. Chairman and other Senators.

I would like to make a small, off-the-cuff remark. After listening to all of the testimonies today, I really wish that our President Roosevelt could be here with us.

Honorable Senators, on behalf of 12,000 dues-paying members of Telecommunicators for the Deaf, Incorporated, this organization, Telecommunications for the Deaf, Incorporated, gives thousands and thousands of TTYs, and has given them in the past 20 years—these TTYs have been given to our organization by AT&T.

Some of the people are behind me today. One of the gentleman is here at the table with me from AT&T. And I wanted to say to them how much we appreciated the help they have given us over the past 20 years.

Okay. Now, on behalf of our organization and the advocate arm, the National Center for Law and the Deaf, and some 22 million hearing-impaired Americans who have varying difficulties using the telephone in the customary manner, I am happy to speak on the wonderful benefits of the new, dual-party telephone relay services that have only recently been available to a small percentage of the hearing-impaired population in only a few States. We are not as much hearing-impaired as we are communication-impaired. And that is a very important thing to notice, that we are more communication-impaired than hearing-impaired.

Because only a few States now offer the relay services, most of us have not realized our full potential at our jobs. We are underemployed in spite of our academic accomplishments. At home, we are not able to phone for a pizza. And bill collectors cannot hound us for not paying our bills on time.

Senator HARKIN. You are lucky.

[Laughter.]

Senator HARKIN. It is time to get ready. They will be.

Mr. TAYLOR. Yes, right.

Many years ago, the rural areas of America were afforded equal accessibility to the telephone when the State utility commissions spread the cost of the expansion equally among all telephone subscribers in that State. We ask that our telephone communication barriers be removed like these geographical barriers.

We also ask that costs associated with that removal be spread among all telephone subscribers.

Centralized, dual-party relay services have been established only in six States for the past two and one-half years. About 20 States are now in the talking stages of obtaining such services. Half of the 50 States are not doing anything about it. The six existing services have very different operating and funding mechanisms. Only one has satisfactorily defined what "full accessibility" is, and it is that the blockage rate or the busy line, when requesting assistance, is to be the same as that of a voice network.

The largest two of the six relay services which handled 300,000 calls last March cannot provide interstate relay services. For all hearing-impaired Americans to access to telephone equally, it is imperative that all 50 States have telephone relay services to give the 22 million hearing-impaired a fair shake in life.

In closing, we ask for a requirement in the ADA mandating full telephone accessibility for the hearing-impaired to be the same as the voice network in which hearing people request operator assistance.

Relay services, like other forms of telephone service, should be an integral part of the telephone network. Universal and equal telephone service for hearing/speech-impaired people must be our goal.

Thank you very much.

Senator HARKIN. Thank you very much, Mr. Taylor.

[Prepared statement of Mr. Taylor appears in the appendix.]

Senator HARKIN. Let's now turn to Mr. Robert Yaeger, Minnesota Relay Services.

Mr. YAEGER. Thank you.

I am the manager of the Direct-Connect Minnesota Relay Service, one of the newest and the most technologically advanced of a half-dozen statewide relay services in this country.

I was previously the coordinator and one of the original operators of the Massachusetts Relay Service, the third statewide service in the U.S.

I am here to speak in support of the Americans with Disabilities Act of 1989, and specifically to address the desperate need for comprehensive intrastate and interstate deaf-run TDD telephone relay services across the country.

A TDD telephone relay service provides a vital link between people, hearing and deaf, who cannot otherwise communicate over the telephone. Each day, we think nothing of calling to make a doctor's appointment, do business with a company or person in another city, State or country, chat with a friend or relative, do our banking or investing, contact a parent whose child is sick at school, make travel arrangements, or, as Paul said, just order a pizza.

How many times do you pick up the phone to make or answer a call every day? Can you imagine having to leave your home or office, to physically travel to handle the business of each one of those calls?

Millions of Americans are denied the freedom and convenience of this device which sits on our desk and, with the touch of a button, connects hearing people to the largest telecommunications system on the planet.

The need for TDD telephone relay service has been proven in the first relay service, opened approximately ten years ago in Connecticut; also, in California, Massachusetts, Arizona, New York, Minnesota and most recently in Alabama.

Now, hundreds of thousands of calls are made each day by deaf and hearing-impaired people, who previously had to wait and depend on a hearing friend or relative, or sometimes a stranger, to make their business and personal phone calls for them—people who are denied jobs on the pretext that "You might have to make a phone call in the course of your job, so a deaf person couldn't handle this position"; people who are denied the right to live their own lives independently because major phone companies didn't consider it necessary or economically feasible to take the extra steps to provide simple phone service to that part of the population until those companies were forced to do so by legislation.

It is imperative, as stated in the bill, that regulations be established to ensure that deaf and hearing-impaired communities 'needs and rights are respected. To leave the quality and guidelines of a TDD telephone relay service in the hands of a hearing-controlled corporation would be as absurd as running the National Organization for Women with an all-male board of directors.

These services are more than just telephones and computer terminals. A relay service is comprised of both telecommunications equipment and human beings; neither functions without the other. It is not just phone lines and fibre-optics; it is about ethics, responsibility, and cultural understanding.

The most successful relay services in the U.S. have been those run by deaf-controlled organizations, where relay operators have been trained by deaf people to understand deaf culture and language. They have been trained by professional interpreters to understand confidentiality, non-interference, and the ethics and methods of facilitating communication between deaf and hearing individuals. They have constantly accepted feedback and input from the consumers they were designed to serve.

In terms of funding, it has been my own experience in Massachusetts that a State-funded relay service is pretty much in trouble from the beginning. State tax dollars are limited, and a ceiling is reached where the State is not able to provide enough funding to increase operators to meet the need of the call volume.

In Massachusetts, when we ran out of State tax dollars and could no longer add operators, callers needed to wait five minutes, ten minutes, half an hour or an hour just to get through to an operator. That is like you or I sitting and staring at our telephone for an hour before we even dial the number.

The most successful method has been surcharges placed on the phone companies 'bill—for example, 10 cents a month in Minnesota. That money is funnelled through the State to a privately-controlled contracted agency.

The common carriers mentioned in the bill, it seems to me, would be phone companies with the technological capabilities, but without the humanistic capabilities necessary to provide quality service to the deaf and hearing-impaired community.

As a former relay operator myself, I have seen the difference these services can make in people's lives. People have written to say the service has opened doors for them, provided a tool for independence, a means for them to live their own lives. A woman calls an ambulance when her husband has a heart attack; someone sets up an interview and gets a job; a teenager gets their first date; a hearing father who had never learned sign language has the first genuine conversation of his life with his adult deaf daughter.

This Act is desperately needed. The millions of deaf and hearing-impaired people in this country have waited long enough for access to the communication equipment that you and I have enjoyed all our lives.

Clearly, equal access is every person's civil right, but until consumer-controlled TDD telephone relay services are available nationwide, the phrase "equal access" is just empty rhetoric.

Thank you.

Senator HARKIN. Thank you very much.

Now we will hear from Gerald Hines from AT&T.

Mr. HINES. Thank you, Senator, Mr. Chairman.

My comments are, I think, with your staff, and they will be, as you said earlier, entered into the record. I am just going to summarize, if I could.

I would like to talk about two aspects just so that everybody has as complete an understanding of what we are talking about here.

The first one is what is the service. I think that Paul and Robert talked about the need that it fulfills, but the actual mechanics of the service, I think it would be good for everybody just to make sure they know how it works because no matter what I say, I probably won't do it as well as the videotapes; I have also asked that the videotape, in case anybody would like to see a demonstration of it, could be included—I see you have it.

The service from a TDD user's standpoint is access to a relay center by dialing an 800 number through their TDD device. That call is answered by a service rep or a communications assistant or a translator in the relay center, also using a TDD device, who then establishes a voice-to-voice connection from the relay center to the person that the TDD user wishes to speak with. Then that person acts as a bridge or as a translator between the TDD user and the voice customer involved. And the service can go either way. A TDD user can initiate the call by dialing an 800 number through the TDD device, or a customer wishing to reach a TDD user can also reach the center by dialing an 800 number also.

The role of the communicator, the translator, in that portion of the communication is to actually make the translation from the TDD text to the speech communication of the receiving end.

So that is essentially the way the service works today. That is the way it works in the three centers that AT&T manages. As noted, the services are currently available in at least six States. AT&T is the provider in three of the States—California, New York and Alabama. Just for your information, and it is part of our written record, our testimony is that we are processing over 350,000 calls a month, or expect to be soon, currently having as many as 300 to 350 attendants involved, and that is just for the three States and the services within the States.

The second area that I wanted to talk about a little bit is the funding. It is one that is probably, from my view, and I think from the company's view, the core of what is preventing us from making the service widely available on a national basis for both local and long-distance calling. It is one that your bill does not necessarily address directly, but it is one that we do believe people need to have a clear understanding of, and it is that while this is a very vital service for the hearing-impaired and the people who use TDD devices to communicate, it is not an inexpensive service.

Senator Dole had mentioned that it was our estimate—and I'm not sure exactly where he got the number, but it is our estimate—that on a nationwide basis, national, dual-party relay service on a nationwide basis, could cost as much as $215 million, and I do think that as part of this initiative, that we do need to figure out a way to address how it is that that expense is going to be paid for an absorbed.

Having said that, I have nothing else to say other than we commend the Senator and the committee for the initiative that they have taken. We, too, at AT&T feel that we are very sensitive to the needs of the hearing-impaired community, and we are delighted to be a part of trying to satisfy that basic need, and we applaud your initiatives in trying to do so.

Thank you, Senator.

[Prepared statement of Mr. Hines appears in the appendix.]

Senator HARKIN. Mr. Hines, let me just ask you, the service that you provide in New York and in California—who pays for that? Does the caller pay for that?

Mr. HINES. Well, there are two parts to it. If you define the service as a combination of a communication services and a translation service, the communication portion of it is paid by the caller in much the same way that a voice-to-voice call is, for example, in the State of New York. An eight-minute call on average would, let's say, be $1.30. That $1.30 is borne by the communicator, in this case, either the hearing-impaired person who initiated the call or the person who is trying to reach him.

The balance of the cost, the cost for the translation portion, is funded in a variety of mechanisms, as noted. In some cases, a surcharge is put on telephone bills for all subscribers in that State, which funds a trust or some sort of funding mechanism so that the balance of the cost, the part for the translation, can be paid to the supplier or the provider of the service.

Senator HARKIN. So in other words, if I am a hearing-impaired person, and I make a call to the relay service, and that relay service has a vocal contact with someone else, I am the initiator of the call—now, obviously, it takes a lot longer time to get messages through that way, because it is just a vocal message.

Mr. HINES. Correct.

Senator HARKIN. So do I just have to pay the normal charges as if it were a vocal call, or do I pay something else?

Mr. HINES. It varies by State, but in most States there are discounts below the standard rate that a voice-to-voice caller would make for that same call. It is all over the map, Senator, but in most cases it is discounted to the hearing-impaired customer for the communications portion of the call.

Senator HARKIN. How does it work in New York?

Mr. HINES. In New York, the communication call is discounted, I believe, at 50 percent—I do not know that for sure, but we can find that for you—the funding mechanism for the balance, the translation portion of the call, is included in the rate base of the local telephone company.

Senator HARKIN. So everybody can send out.

Mr. HINES. Right.

Senator HARKIN. What would it add to a phone bill?

Mr. HINES. Well, just using an average 8-minute call, again, the communication part is $1.30 or thereabouts, and the total cost including that $1.30 is just under $9.00. So it is adding $7.70 beyond the communication, as an illustration to you.

Senator HARKIN. If I am a hearing user in this system, I pay $7.70 more per month?

Mr. HINES. No; per call. I am sorry, maybe I misunderstood your question.

Senator HARKIN. What you said is that the call was discounted 50 percent.

Mr. HINES. Right.

Senator HARKIN. But somebody has to pick up that other 50 percent, and so it is the rate base, it goes to all other calls.

Mr. HINES. Right.

Senator HARKIN. What does that add? What does that add to the phone call—50 cents a month, 10 cents a month, $20 a month? How much is it?

Mr. HINES. In most cases, it is——

Mr. TAYLOR. It is 12 cents.

Senator HARKIN. Twelve cents a month in New York.

Mr. TAYLOR. Yes.

Mr. HINES. Yes, and that varies. In some States, it is 20 cents a month.

Senator HARKIN. What was the $7 and some cents you were talking about?

Mr. HINES. On a per-call basis, on a per-call basis. On an 8-minute call, the time of that 8-minute call for the communication, including the translation, the cost of that call on average is about $9.

Senator HARKIN. So if it is $9, $4.50 is picked up by the caller——

Mr. HINES. No.

Senator HARKIN. Well, you said it was 50 percent.

Mr. HINES. The communication portion of the call versus the translation portion of the call—communication portion meaning the point-to-point rate that we would apply if it had been a voice-to-voice call would have been $1.30, which is discounted in this case by 50 percent to the person who initiated the call. They do pay for part of the service; that's the point.

Senator HARKIN. Okay. Then the big portion is obviously the salary——

Mr. HINES. Right, and that, then, across all calls—I was using a typical——

Senator HARKIN. That is the 12 cents, then.

Mr. HINES. That, then, is spread across the entire rate base is what constitutes the 12 cents per month.

Senator HARKIN. Is that spread across all ratepayers in the State of New York?

Mr. HINES. Yes.

Senator HARKIN. So it might be a little bit more in a State of less population.

Mr. HINES. I believe in the case of Alabama, it is 20 cents a month. It is all spelled out; we can get you that——

Senator HARKIN. Could they do it on a regional basis?

Mr. HINES. You could. There is no reason why you couldn't. Actually, if you were going to offer a nationwide service, it is probably exactly what you would do.

Senator HARKIN. Sure. It seems to me that would make more sense.

Mr. HINES. Clearly. We have looked at it from a national basis, and I think our plan would be that it would take 10 regional centers to provide the entire service needs nationwide.

Senator HARKIN. Mr. Taylor?

Mr. TAYLOR. I would like to explain just a little bit about the regional idea. In New York, we have 41 local telephone companies, and those 41 are represented through New York State, the New York State Telephone Association. All 41 agreed to pay for the relay service with the understanding that the telephone charges would be included in the rate base.

Okay. Now, three weeks ago, I was in Pennsylvania. I was talking to the Public Utility Commission in Pennsylvania. Also in Pennsylvania, they have 41 telephone companies. So right now, the PUC is talking with 41 telephone companies in Pennsylvania. If the 41 companies agree to have that same funding and operation mechanism, maybe Pennsylvania will join with New York in a year.

So that could happen.

Senator HARKIN. Okay, good. Thank you.

Of course, some States have relay services provided by nonprofit——

Mr. HINES. Right.

Senator HARKIN. That is what you do?

Mr. HINES. Right.

Mr. YAEGER. Yes.

Senator HARKIN. And is your organization statewide?

Mr. YAEGER. Our organization is a private nonprofit agency that has now been contracted by the State of Minnesota to run the relay service. Originally, they ran a resource center, a retailer of TDDs and assisted listening devices, and information and referral service, a place to go where you want to know where you can get services. Our agency can send you there.

We have since been contracted to run the relay service. Our service covers the entire State of Minnesota. And in fact, from the Minnesota service as well as the services in Massachusetts, Arizona and Connecticut, you can call a TDD user, anyone initiating the call can call anywhere in the country and anywhere in the world. In California and New York and, I assume, Alabama, since divestiture, callers there cannot call out-of-State over the relay services because AT&T as the long-distance carrier would be making money off that call, and the law says they cannot do that. So the people in those States cannot call out of their own State.

In Minnesota, we have already relayed calls to Europe and Japan; in Massachusetts, we have called South America and Australia, and all over the country.

So I am not sure if regional centers would be able to get around that. I am not sure if that is possible. It might require a change in the long-distance laws.

Mr. **Taylor**. Excuse me——

Mr. **Hines**. Just if I could, Senator, my comment on the regional centers was really from an operational standpoint. I don't disagree as to what would have to change vis-a-vis tariffs and regulations. But from a practical standpoint of delivering the service, I think people would agree that regional concepts provide some more efficiencies than having a State-by-State center. But it is really a function of how much volume you have.

Today, on a voice-to-voice communication through operator services, we have essentially operator centers in every State, but it is simply because of the volumes of—clearly, in the engineering and design of the relay service, you start with one, and then you start to expand, and it may eventually reach State-by-State. But at this point it would appear that operationally, it would be most economically served by a regional concept.

Senator **Harkin**. What do ratepayers pay in Minnesota for your service?

Mr. **Yaeger**. Ten cents a month.

Senator **Harkin**. Do you think there is enough flexibility in this bill to allow alternative means of accomplishing the objectives of Title V?

Mr. **Yaeger**. I am concerned about the phrase "common carriers", and I am concerned about—I believe there is a section in there that says the service need not be inter- and intrastate until after the first year——do I read that correctly?

Senator **Harkin**. Staff says it takes one year to set it up.

Paul, how do you feel about alternatives? Is the bill flexible enough to allow different alternatives, and is that good?

Mr. **Taylor**. Yes. I think it is fine to have alternatives, but there must be one common principle, and that principle is full telephone accessibility. In New York State for many, many years, hearing people have been able to contact telephone operators 99 out of 100 times they try. And that is written in the PUC law. Okay. Now, with the same principle of accessibility, it must also pertain to the deaf people to have 99 percent accessibility to the New York Center operators; 99 times out of 100, they must have exactly the same.

If the principle of accessibility is the same, fine. I don't care how they run it or fund it or what.

Senator **Harkin**. Okay. Thank you all very much. I especially thank you for giving up your lunch period to stay around here. It was very good testimony, and I appreciate your all being here, Paul, Robert, and Gerald.

The subcommittee will stand adjourned until next Tuesday, when we will have a hearing in this room starting at 2:00.

[Whereupon, at 2:11 p.m., the subcommittee was adjourned.]

AMERICANS WITH DISABILITIES ACT OF 1989

TUESDAY, MAY 16, 1989

U.S. SENATE,
SUBCOMMITTEE ON THE HANDICAPPED, OF THE COMMITTEE ON
LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:15 p.m., in room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin (chairman of the subcommittee) presiding.

Present: Senators Kennedy, Harkin, Simon, Hatch, and Durenberger.

Senator HARKIN. The subcommittee will come to order.

Last week, the Committee on Labor and Human Resources and the Subcommittee on the Handicapped held hearings on The Americans with Disabilities Act of 1989. We heard witnesses explain why the ADA is the most critical legislation impacting on the lives of people with disabilities ever considered by the Congress.

The witnesses also discussed the provisions in the bill pertaining to employment, public accommodations, State and local governments and telecommunications.

Today, the committee will hear testimony on the provisions in the bill pertaining to transportation. A recent poll conducted by Lou Harris found that not working is probably the truest definition of what it means to be disabled in America. He also found that being disabled means having less social life than nondisabled people and not being able to get around and socialize as much as they would like.

Disabled Americans participate much less often in a host of social activities that other Americans regularly enjoy, including going to movies, plays, sports events, and going out to eat at restaurants.

Disabled people are also less involved in community life than are nondisabled Americans. What are the barriers that constrain their activities? People with disabilities identified lack of accessible public transportation as one of the primary barriers that constrain their activities and employment opportunities. The ADA of 1989 eliminates many of these barriers.

With respect to public transportation, the ADA of 1989 reflects a balanced and well-reasoned approach for meeting the needs of persons with disabilities. This bill generally focuses on preventing new transportation barriers from being created and provides flexibility for smaller transit authorities.

The ADA bill of 1989 also includes special provisions applicable to the purchase of used buses in the demand-responsive systems.

This bill also applies to rail systems and specifies that new cars be made accessible. One car per train can be accessible, and key stations must be made accessible within 20 years.

With respect to transportation provided by private entities in the principal business of transporting people, this bill sets forth the basic policy that in the future, people with disabilities will have ready access to and use of private transportation services provided to nondisabled persons.

The provisions in this bill are intended to be implemented by these private entities in such a way that the continued viability of transportation services made available to the public at-large will not be jeopardized.

I look forward to hearing witnesses discuss ways to best accomplish this goal of assuring people with disabilities ready access to and use of public transportation services provided by public and private entities.

At this point again, I welcome to the subcommittee our committee chairman, and a person who has really been instrumental in moving this committee along and making sure that we get this bill up, Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I just want to again express our appreciation to you for the series of hearings that you have held to date and for this hearing today. In other hearings, you have addressed the issues of communications and public accommodation and employment. What is important is that we make progress in those areas, and it is extremely important what we do. If we don't address the issues in terms of transportation, we really do not meet our responsibility in establishing real civil rights for the disabled.

So I commend the work that has been done in the past, particularly in those areas. I certainly recognize as you have, that the paratransit programs are not effective in dealing with the long-range concerns of so many of our fellow citizens. I think we have got a good, balanced group of witnesses today, and I look forward to their testimony.

I think we are moving along in terms of the hearing record. We have indicated that we want the input of the Administration; I know we are eagerly awaiting it. But again, we want to give the assurance that this is a top priority for our Labor and Human Resources Committee, and I am very hopeful that we can move to markup very quickly.

Thank you.

Senator HARKIN. Thank you very much, Senator Kennedy.

I appreciate hearing that, and I hope that we can move this to a markup very soon.

Senator Hatch?

Senator HATCH. Thank you, Senator Harkin.

I want to raise with you, Mr. Chairman, the timing of the committee's consideration of S.933. I think it is clear that all of us want to proceed in a bipartisan fashion.

Senator Dole came before us last week and said the same thing; the Administration wants a bipartisan approach. And in my view, it is imperative that this committee hear testimony from the Administration on this bill.

We need to hear from the FCC on the telephone relay system provision; we need to hear from the Department of Transportation about the transportation provisions of the bill; we need the analysis of the Department of Labor and the EEOC on the employment provisions; the Department of Justice has to give us the benefit of its experience over 25 years of civil rights enforcement in analyzing not only the substance of the bill, but its detailed enforcement scheme.

Now, Mr. Chairman, the Executive Branch does have a great deal of expertise in this area, and I have been told that they want to participate. Now, I have told the Administration that they must move expeditiously on this bill. But let us be fair. It is a new administration. This is a complex bill with enormous ramifications. It is much like the 1964 Civil Rights Act in its scope, and in many cases, I think you can find that it is even broader.

I support the underlying concept of the bill. We have worked together to try and reach a consensus, and I hope that we will continue to do so.

President Bush does support the concept of the bill, and you and others have frequently quoted the President on this. He is sincere. He is proceeding in good faith, but the Administration has asked for some time to review this and comment in depth.

Now, I do not believe that we should wait indefinitely for the Administration, and I have conveyed that to them; I want you to know that. But let me propose the following. I think it would be well if you would issue a hearing of the committee during the week of June 19th and schedule an invitation to testify to the relevant Federal agencies this week. Now, this is less time than they personally requested of me, but in my view, that gives them fair notice, a realistic deadline to work toward, and a sharpened focus. If they still are not ready to give us their definitive view, then we should resume the discussions that we were having when you decided to wait for the Administration rather than continue the dialogue with me last month—and I had no particular quarrel with that.

If they have a position to give us during the week of June 19th, then we can work together with the President to come up with a common ground, or move ahead on our own. In either case, we can mark up the bill, I think, in early July, take one markup session or two markup sessions back-to-back, and have it ready for Floor action shortly thereafter, hopefully no later than the August recess if not much earlier. And that is ample time to pass it this year if we can. And I pledge that I will not seek delay in the committee, and I will seek only to have fair and expeditious consideration of any unresolved differences if we can agree to this schedule.

Now, if you can quote George Bush about the bill, if the President can act in a bipartisan way on so many issues—the budget, Contra aid, et cetera—then I think we can take him at his word and give him some more time. I might add that in response to Congressman Coelho's request to me in the hearing last week and in a personal call to me, he asked me to not file my bill in order to prevent unnecessary fragmentation and division, so I have refrained thus far from introducing my own bill.

I have had a number of Senators express interest in it, but I have held off because of that. And on top of that, I have just publicly delivered an ultimatum to my own President that if they can't give us help by the week of June 19th, then we will move ahead without them. I think they will. I know that they are sincere about it and want to do something about it.

Finally, let me say this. If we can get together on a bill, liberals and conservatives, Republicans and Democrats, and the Administration—and I emphasize "and the Administration"—that broad consensus will be just as important to the success of this entire effort as the language of the bill itself. This is because there is prejudice out there, and there will be resistance to any bill by certain or portions of our society.

A united front across the spectrum I just mentioned in support of the bill will go a long way toward gaining acceptance for the principles of the bill and head off some potential compliance problems. I think that is worth giving the President another 5 weeks to present his detailed position, and I hope we can agree on that timetable, because if we can, I'm going to work as hard as we can to see that this is brought about.

I think it is a smart thing to do if you can, and I'll work very hard to try and bring this about, and I certainly would like to support the bill. Now, Congressman Coelho said that you will continue to work with me, and maybe we can arrive at a consensus behind a very broad-based bill that is going to do an awful lot of good, on which we can get a broad bipartisan coalition and consensus, and in the end, do an awful lot of good for those within our society who have disabilities.

So I'd like to make that proposal. I think if you can accede to that—and I think it is in everybody's interest to do so—I think it puts the Administration on notice, I am putting them on notice, and I will do everything I can to get them involved as we possibly can in this process and hopefully get this resolved.

Senator HARKIN. Thank you, Senator Hatch, very much for those comments. I would just say again publicly for the record, as I have said privately and also publicly last week, that I have appreciated working with you——

Senator HATCH. Vice versa.

Senator HARKIN. We have had an open relationship on this. Our staffs have gotten together. You have made some good suggestions on this, and we have made some changes according to your suggestions, and we have talked about it. In anything like this, there are always going to be little things or nuances, things that people disagree on. Reasonable people have different approaches, and I am fully aware of that, and I understand that.

But I have always found you to be very forthcoming and very open and honest in your approach and your desire to make sure that we do pass an ADA bill. And I know you are just as interested in passing it as anyone else, and I appreciate that.

Senator HATCH. Yes, I sure am.

Senator HARKIN. I think your offer sounds like a good one, and it sounds solid. I guess I am a little disappointed that the Administration waited as long as they did, but what the heck; I am willing to forget about that. I mean, they have been part of this process since—

Senator HATCH. It is a tough process for them; they've got lots on their table, too.

Senator HARKIN. I understand that. But it seems that here we are, this is May the 16th—we are talking about a month, and we have one week off next week, so we are going to be gone about ten days, it seems to me.

Senator HATCH. So we are really giving them about three of our weeks.

Senator HARKIN. About three weeks, that's about it. And I assume what you are saying is that if they aren't willing to come forward on June 19th—I don't even know what day of the week that is——

Senator HATCH. Well, during that week, whenever it is convenient for the committee. But I think we ought to put them on notice and tell them we'd like to hear from them and have their viewpoints at that time—and maybe we can get this all put together by them, and they'll come in and say they're all for it. It would be wonderful if we could.

Senator HARKIN. I don't know how many witnesses they'd want to send up——

Senator HATCH. I think that can be worked out.

Senator KENNEDY. Mr. Chairman, it would seem to me that the Administration could speak with one voice, hopefully, so I wouldn't think it would necessitate a lot of witnesses. I mean, I don't think we are going to be hearing from Department of Transportation, Education, Housing and all the rest. Hopefully, they are using this time to have a coordinated and consolidated position.

So it would seem to me that the offer of the Senator from Utah that the Administration present its views during the week of June 19th, makes sense, and then I think there would be no reason why we couldn't have a successful markup and action before the recess.

The Senator from Utah points out that it is a new Administration—of course, the President is very familiar with this legislation, personally very familiar with it, and I think the chair has been very accommodating to indicate, as he did when Senator Dole was here, that the 60-day period is something that they had wanted and that we were going to still move ahead on our schedule, but that we are always going to welcome the Administration as they reach their own conclusions.

It seems to me that if we are able to get someone from the Administration on June 19th who is going to speak on that issue, I think then we would not have any problem, quite frankly, in meeting certainly the hopeful and intended schedule of markup and Senate action before we move out on recess.

Senator HATCH. If I could just add, I really believe—and this is putting a lot of pressure on them for me to say this, and I'm doing it on my own, and I'm saying, "That's enough time for you to go over this bill thoroughly"—and even though the President is generally familiar with the concepts of this bill, there are a lot of very, very technical and difficult nuances of this bill that have to be gone over by the experts that serve him and that serve the Administration.

So I can understand why they might want even more time, but I am suggesting that if we do it during that week—and hopefully, they will between now and then negotiate with us and get this thing resolved—if they do, then I think one witness or more could speak with one voice for the Presidency. If not, they may want to have people from the various agencies where they have concerns come in and say, "These are our problems with these areas, and this is what we'd like to see changed in these areas," if we can't get it resolved by then. And hopefully, we would get that done—Transportation, Health and Human Services, Department of Labor. There are a lot of areas where we might want to have them come in and say, "These are areas where we would like you to make some changes."

But hopefully by then, by working together in a good faith effort, we will come up with a bill that is very broad-based, that is a monumental landmark bill that will open up this country like never before for those persons with disabilities—and we can do it in a bipartisan way. If we can, we are all going to feel very, very good about this, and I'm going to do everything I can to see that that comes about.

Senator KENNEDY. Well, as I understand the Senator from Utah he has suggested that we, sometime that week of June 19th, invite the Administration; whether they come or whether they don't come, that the Senator from Utah is going to work with Senator Harkin and others so that we will work out a markup schedule and action on the Floor of the Senate before the August recess.

Senator HATCH. That's right. If the Administration differs, they can come up with their own bill, and we can try and substitute it or whatever, if that's the way it is. But I am hopeful we can bring everybody together.

I know that the chairman of this subcommittee and Congressman Coelho both expressed an interest and a desire to get this resolved, and so did the chairman of this committee as well. And I am interested in getting it resolved. I want to have it resolved in a way that will create the widest bipartisan coalition and create an overwhelming ability to move forward with this bill against those who might want to throw roadblocks up no matter what we do.

So I will work hard to do that, and I appreciate the willingness to look at it this way.

Senator HARKIN. Again just to clarify this, the Administration has had this bill since March 15th, so they have had it in their possession now for over 2 months. And I think another 3-week delay in that is not unreasonable. It sounds like something we could definitely accommodate, especially with your good faith intention to move ahead expeditiously after that, whether they show up or not——

Senator HATCH. I'll help you move ahead; as much as I can, I'll help you move ahead.

Senator HARKIN. Yes, we'll move ahead on the bill.

Senator HATCH. I hope I can fully be in support of it by then. I do have, as you know, some real qualms about it right now.

Senator HARKIN. The only other thing that I might just say is if the Administration does show up with a witness, I am sure they will have their technical experts here with them, but they will have one witness that will speak for the Administration.

Senator HATCH. I think so.

Senator Harkin. If there are a lot of issues that are raised at that hearing, it would be my intention to reserve some time for perhaps some outside witnesses representing the different disability groups that come in to perhaps respond to that—I don't want to use the word "rebuttal"—but perhaps just to respond, so we can get that kind of input on that shortly afterward.

Senator Hatch. Let's hope we won't need that.

Senator Harkin. I hope we don't.

Senator Hatch. Actually, in my view, if we could make some——

Senator Harkin. I hope the Administration comes in and just supports the bill.

Senator Hatch. Yes, I do, too. Well, they're not going to support it, I think, in its present form. But if we can resolve the few remaining issues that I see that need to be resolved, I believe we can bring about that kind of consensus. But it is going to take some real effort on our part, and we are willing to work day in, day out between now and then to try and bring about that consensus. If we can do that, it is certainly going to make your life a lot easier and everybody else's, too.

Senator Harkin. Well, let's consider it done, then. This committee will schedule a hearing with the Administration during that week of the June the 19th.

Senator Hatch. I appreciate that.

Mr. Chairman, if you will forgive me—I want to be at this hearing, but I have an Intelligence Committee meeting that I absolutely have to go to; it is one of those where you just have to be there. So you will have to forgive me. But we will pay just very strict attention to everything that goes on, as we have in the last two hearings, and please forgive me.

Senator Harkin. And we'll continue to work together; even though the Administration is coming up on June 19th, we will continue to work together.

Senator Hatch. Let's do that, let's open it up, because I think that we can help the Administration—OK?

Senator Harkin. Okay. Thank you very much, Orrin. I appreciate it.

Senator Hatch. Thank you.

Senator Harkin. Let me just also ask unanimous consent to insert in the record an editorial from the Arizona Daily Star, which was sent over to me by Senator McCain. Senator McCain has been a strong supporter of the ADA bill, one of its original cosponsors. He has a very longstanding interest in and strong support of the legislation. Senator McCain was kind enough to send over an editorial that appeared in the Arizona Daily Star called, "Breaking Barriers: Federal Protection for Disabled Long Overdue", and going on to say that this bill is one that must be passed. So I would just insert that in the record.

[The document referred to appears in the appendix.]

Senator Harkin. Our first panel today on the issue of transportation is Michael McIntyre, Queens Independent Living Center, Jamaica, New York; Mark Johnson, Alpharetta, Georgia; Laura Oftedahl, Columbia Lighthouse for the Blind; Dr. Mary Lynn Fletcher, Director of Disability Services, Loudon County, Tennessee.

If you would all make your way forward to the witness table, I would appreciate it.

Mark Johnson has been delayed; he is on his way.

We welcome you all to the committee and appreciate you coming a long distance. And again, because of our time constraints today—we have a vote coming up this afternoon on an important issue on the Floor—we are going to have to expedite as much as possible. I would ask each of you to summarize your statements in at least 3 minutes or so, 5 minutes at the most, and leave a little bit of time for some questions. If you could do that, I'd certainly appreciate and we could move this process along.

So first, I will recognize Michael McIntyre, Queens Independent Living Center, Jamaica, New York. Welcome.

STATEMENTS OF MICHAEL MCINTYRE, QUEENS INDEPENDENT LIVING CENTER, JAMAICA, NY; LAURA OFTEDAHL, COLUMBIA LIGHTHOUSE FOR THE BLIND, WASHINGTON, DC; DR. MARY LYNN FLETCHER, DIRECTOR OF DISABILITY SERVICES, LOUDON COUNTY, TN, AND MARK JOHNSON, ALPHARETTA, GA

Mr. McIntyre. Thank you.

Good afternoon. My name is Michael McIntyre, and I am the Executive Director of Queens Independent Living Center, a nonresidential, not-for-profit resource and support advocacy organization, run by and for people with disabilities. Queens Independent Living Center is also a member of the National Council of Independent Living Centers.

I appreciate this opportunity to present testimony to you today in support of the Americans with Disabilities Act of 1989.

On behalf of the National Council of Independent Living Centers members, we strongly urge you to support the ADA transportation provision as it stands. As someone who serves as an advisor to the New York City Department of Transportation and as a consultant to private bus companies, I have a professional expertise in the area of accessible public transportation. As a motorized wheelchair user, I also have a personal knowledge of what an accessible transportation system can mean to a person with a physical disability.

Living in New York City, I am very fortunate to be able to use the city's accessible public bus service; also, with key accessible subway stations. There are now plans by the New York City Department of Transportation to start a paratransit program this summer in order to provide a needed service for transportation-disabled who cannot use accessible buses and subways because of their disabilities.

I use public transportation daily to go to work and to social functions. I have been using lift-equipped buses since 1983. It is the only affordable means of transportation for persons with disabilities who want to be part of the mainstream of our society, and for those who want to have the independence of not being tied to a fixed schedule, and to enjoy the freedom of choice all others do who are nondisabled.

Americans have traditionally enjoyed many freedoms. Many Americans, however, have not been able to exercise those freedoms for lack of the simple ability to travel. The freedom to go to college does not exist without the means to get to the college; the freedom to work does not exist without the ability to get to work; the freedom to organize politically does not exist without people being able to get together in one place; the freedom to date, to go to the movies, to go to the library, to go shopping, to go to a ballgame—anyplace that makes life meaningful—is predicated on the ability to travel.

If freedom is an abstract word, money is not. With the ability to travel, many disabled Americans will be able to get the education that will in turn get them meaningful jobs, that will allow them to become taxpayers instead of tax users.

The issue of transportation has been a symbol in the civil rights struggle for Black Americans in the fight against discrimination. Today it plays a significant role in the civil rights movement of persons with disabilities. Public transportation must be accessible and affordable to every American. All States, counties and cities providing public transportation must be required to make their public transportation services accessible to persons with disabilities.

I would like to reiterate that the Americans with Disabilities Act transportation provision will ensure a working and viable public transportation system for all Americans. Only through accessible public transportation can people with disabilities have the freedom of movement that all other Americans take for granted.

Independent Living Centers are service centers, but they are also embodiments of a philosophy. The motto of our center is "Dignity and Opportunity for People with Disabilities." Help us make our motto a reality by approving the Americans with Disabilities Act. We ask for no more; we demand no less.

Thank you for providing me this opportunity to testify.

Senator HARKIN. Michael, thank you very much.

Before we start questions, we'll just go through the panel.

[Prepared statement of Mr. McIntyre appears in the appendix.]

Senator HARKIN. Next we will her from Laura Oftedahl, Columbia Lighthouse for the Blind. Welcome to the subcommittee, Laura.

Ms. OFTEDAHL. Thank you. Good afternoon, Mr. Chairman and members of the subcommittee.

My name is Laura Oftedahl, and I am the Public Affairs Director for the Columbia Lighthouse for the Blind here in Washington, D.C. I speak to you today as a consumer, a professional woman who is visually-impaired.

And lest you worry that my speech is going to go on and on, I have about 18 pages of print, but it is done in accessible format of 36-point type so I can read it—you could probably read it better up there than I can, but I'm doing a pretty good job. This is all done with off-the-shelf hardware and software.

My work experience has included jobs in sales, broadcasting and public relations. I have also been very involved in competitive sports and have won medals in national and international cross-country ski races. I bring that up because competitive sports activities provide people with disabilities the opportunity to prove what we can do. Too often, we are told what we can't do and how we cannot compete effectively in society. But I want to say we can do it.

You might be asking yourself at this point—this woman sounds like she has her life together; does she experience discrimination? Does she really need the ADA?

The answer to the last question is a definite yes. Although I try to lead a fairly normal, productive, active life despite my disability, I nevertheless face barriers which the Americans with Disabilities Act will address.

I have been asked to discuss primarily transportation barriers and barriers to accessing public services. I could also easily talk about employment discrimination because I have experienced that, too. My bottom line message to you is that the accommodations I need as a visually-impaired person in order to effectively access transportation and public services do not cost a lot of money, and for the most part, they will be of great service to the general public as well.

Let me give you a few real life examples. I am a regular subway rider, but for me as a visually-impaired person, each trip requires a great deal of extra concentration. Way-finding for a blind or visually-impaired person is a task that involves all of one's remaining senses.

I have frequently tried to ride an escalator in the wrong direction because I cannot see the directional arrows. I have been disoriented when embarking from a subway car because of the great variations in lighting from inside the car to the platform edge, which is very dark on the platforms here in Washington, D.C. And while on the platform, I cannot read the signage and must rely on information from other passengers, which many times is misinformation from other passengers, so I find that I am on the train the wrong way and have to turn around and go back someplace else.

And I must always be very vigilant as to where the platform edge is, because just a casual conversation with another passenger might be deadly for me because I have not been paying attention to where I am.

So I must always be aware of all of these orientation cues available to me.

The subway platform is also very hazardous during the jostling of rush hour as well, and the subway station environment can be quite confusing for a blind or visually-impaired person because it is not all uniform. The transfer dispenser and the add-fare machines are in different places in each station.

Bus transportation can also pose a problem. I and many of my blind and visually-impaired friends have often been late for appointments because we have asked a bus driver to tell us when we get to our stop, and that person has forgotten, and we consequently miss important appointments, even things like going to a prospective employer, which can be quite embarrassing.

Bus transfer points can also be very confusing. This is where a lot of buses converge, and particularly at night it is very hard to read the signage, and one also doesn't want to just walk up to anyone to ask them for directions late at night.

So features such as adequate lighting, safety strips on platform edges, readable signage, and public address systems on buses, coupled with better training of vehicle operators, all these would greatly enhance my access to public transportation. And these accommodations, which I understand may be required by the ADA, are not costly and more importantly would benefit everyone.

Some of the people who have fallen onto the subway platforms and subway tracks here in Washington have not been blind, but they have been careless fully-sighted individuals. Thus, safety features, such as platform edge markings and adequate lighting, would help not only us blind folks but everyone.

Public transportation authorities have also attempted to exclude blind people from the use of paratransit or dial-a-ride systems. Such discrimination is predicated on the notion that blind people can physically mount a fixed-route bus. Well, although a blind person without a secondary disability can be very capable of getting onto a bus, a blind or visually-impaired person, depending upon his or her travel skills, may not be willing or able to cross the six-lane highway to reach the fixed-route bus stop. And also, finding the actual location of the bus stop is a problem as well for blind people.

Now, turning to access to public services, many of the same variables do arrive. Few agencies produce publicly-distributed material in Braille, large print, recorded, or computer-accessible form. When public information is not available in special media, alternate access such as personal assistance is frequently not available.

I recently experienced this problem when I applied for a non-driver's I.D. license. It was very difficult for me to figure out which line to stand in at the DMV. Once I finally got up to the counter, the woman behind the counter threw me a couple of forms to fill out. I could not read the forms. I politely asked could I have some assistance filling these out. She grunted at me, "It's not my job," told me to go home and come back with them—which I had had a hard time getting there in the first place.

I ended up asking someone else in line to take their time to help me fill out the forms. And the woman behind the counter never did offer to find a supervisor or any assistance.

Mr. Chairman, I believe that the barriers I have described above can be eliminated at minimal cost and with benefit to the general public if the ADA is enacted into law. I hope the Congress will recognize the barriers faced by all people with disabilities which impede our full participation in society, and I urge you to promptly pass the Americans with Disabilities Act.

Mr. Chairman, this concludes my remarks.

Senator HARKIN. Laura, thank you very much. Again, more examples of what we heard last week. A lot of times, things that can be done are minimal; if people just think about it, it doesn't cost all that much money.

[Prepared statement of Ms. Oftedahl appears in the appendix.]

Senator HARKIN. Dr. Mary Lynn Fletcher, Director of Disability Services, Loudon County, Tennessee, welcome to the committee.

Dr. FLETCHER. As noted, my name is Mary Lynn Fletcher. I am former executive assistant to C. Everett Koop, Surgeon Director, and was the Director for the Health in Underserved Rural Areas Program, which we irreverently refer to as the HURA Program.

For eight years of my life, I worked in rural America from Point Barrow, Alaska, Binghampton, Maine, Glendive, Montana, Maquoketa, Iowa, New Mexico, and now in Loudon County, Tennessee. I worked in rural America to provide a basic level of health care to rural citizens. Gentlemen, I know rural America—its beauty, its uniqueness and its problems.

From these experiences, I have come to realize three things. Rural America is not unlike Third World nations in some parts of our country, especially in the Southeast where I live.

Secondly, rural America is facing economic gridlock; and finally, those persons who are disabled are so profoundly isolated, we do not live, we exist, on a slow slide into hell.

This testimony is the result of a volunteer rural health officer trying to respond to 1) an aging population; 2) the backlash of mainstreaming disabled children into the school system; 3) the cultural myth that disability is something to fear rather than to accommodate; 4) a system of irrational, ill-conceived, and inaccessible services, and finally, to the notion that a disabled person is incapable as a "social creature" and thus not part of the community, and therefore unemployable in those jobs which we have.

Most view rural America as a Currier and Ives painting—the bucolic lifestyle which is simple and unhurried. We all yearn to simplify our lives with that image, as Thomas Jefferson so eloquently envisioned over 200 years ago. But today, rural areas, specially my beloved Southeast, are experiencing rape—rape of our resources, our heritage and our people.

I have brought some graphs to demonstrate the plight of the Southeast as well as the numbers of persons with disabilities living in rural America. If you will note from the one over here, when you see the distribution of disabled persons to the able-bodied population, fully 36.4 percent of the total disabled population which, using your 43 million, would be 115.5 million folks live in the Southeastern United States.

And yet, for example, in Tennessee, we have only two Independent Living Centers.

Now, if you will other note the other one on the far corner, it shows the distribution of disabled and able-bodied population. In the general population, 30 percent live in rural areas, but disabled, 34 percent of the total population live in rural areas.

Yet we have few resources with which to intervene.

How the disabled person is viewed in America has a lot to do with how we survive in rural America. How America views the person with a disability seems to be inextricably intertwined with the nature of how we view ourselves as Americans—a competitive, self-starting group of rugged individualists who deplore dependency.

But the disabled person sort of violates that image. It is almost a contradiction in terms to say "a disabled American". Society on the one hand stresses health of mind and body, and on the other hand we are faced with increasing numbers of disabled.

If you will note, over a 30-year period, the incidence of disability has increased over 67 percent, shown in the middle chart here.

Medical technology has outstripped and outpaced our moral and intellectual capacity to understand the needs of those whom these devices are saving. We have learned to save lives, but we have not learned to live with the results of them.

I have tried for some time to find a means to explain to able-bodied people and people who live in urban areas what it is to be disabled in a rural area. If you will, please note on the very last page of the testimony, it shows all of the things which isolate the disabled. And if you will look at the very last one, which says "rural", you can barely see it; it obliterates the person.

Now, will the ADA affect those of us in rural areas? The answer is an unqualified yes, because Section 504 and the Rehabilitation Act of 1973 do not reach us because we have very few Federal funds in rural areas.

Communications. Let me put a human face on rural America, and this goes, I think, to the point which is ADA. There is a story which I cannot verify that a deaf couple who lives in the upper part of our county's house almost burned to the ground because there is not one TDD in my entire county. There is no means to communicate with the deaf.

I can verify that there are no TDDs in my entire county and in most rural areas in Tennessee to which I have travelled.

Employment. I do not even know where to begin on the discrimination. Most of the problems related to disability in rural areas are due to benign neglect. With employment, it is outright discrimination. I work every day of my life on employment issues.

We have basically no protection of those private industries—and we have five major employers in a rural area—school systems, city and county governments, rural hospitals—if we are allowed to keep them—and banks.

We need the ADA, and we need specifically to have those protections that you talk about when you talk about penalties for those employers who discriminate. I would urge you to stick to your guns on that provision for the possible penalties, because in rural America, without those penalties, we will have no employment.

Eighty-two person of those in Tennessee who are disabled are unemployed, for example, and 17.3 percent of our total population have a disability. That is an economic tragedy. And without some kind of penalties, we will not be able to employ the disabled.

Finally, we have tried for over 60 years to change people's attitudes, but America is afraid of itself becoming disabled and dependent. Therefore most would like to ignore these problems. Until basic civil liberties are a right rather than a privilege, the person with a disability will remain an object of charity. A people diminished before the law is diminished before society. And until there are strong laws, a person with a disability will remain isolated or, as Gliedman and Roth noted in their book, The Unexpected Minority, "an isolate and thus socially incompetent or in the original Greek meaning of the word 'handicapped', an idiot."

I thank you.

Senator HARKIN. Thank you very much, Dr. Fletcher, for that fine testimony.

[Prepared statement of Dr. Fletcher appears in the appendix.]

Senator HARKIN. Now, Mark Johnson. Welcome to the subcommittee.

Mr. JOHNSON. First of all, let me apologize for being a little late. Believe me, it wasn't planned. The irony of the situation is that a private van that was being used to transport myself and other people to different activities here and in Philadelphia broke down due to a lift problem. The irony of the situation is that in most cities that choose to use paratransit only, I may not have made it here today at all.

Fortunately, I had another backup private van and was able to get here when I did. So I guess there is some irony to the fact that I am here to talk about transportation and the need for total access to public transportation.

Let me start with some basic facts. This year is the 25th anniversary of the Urban Mass Transportation Act, the 16th anniversary of Section 504, and 10th anniversary of the original mandate to make public transit totally accessible to people with disabilities.

Federal funding for public transit was reduced from $4,615 million in 1981 to $3,215 million in 1988. In spite of these cuts, the number of lift-equipped buses has increased from 11 percent in 1981 to over 31 percent in 1988. Thirty-eight percent of United States transit systems provide both fixed-route access and paratransit services.

California led the way with legislation in 1971, 18 years ago. Seattle's metro made a commitment to total access in 1978, 11 years ago. By 1991, Denver's entire fleet of over 700 fixed-route buses will be lift-equipped. In addition, Denver operates paratransit services.

Miami Valley Regional Transit Authority in Dayton, Ohio, uses a three-pronged approach: fixed-route access, accessible vans, and taxi services operated by the private sector. In addition, Miami Valley Regional Transit Authority is involved in interagency coordination efforts and initiatives.

The Department of Transportation in a one-page summary dated June 9, 1980 highlighted the reasons for the accessibility approach underlying the Department's original transportation regulations implementing 504.

Let me quote. "When the Department of Transportation provides grants for the operation of mass transit systems, handicapped persons should be able to use such mainline systems."

"Moreover, it is much less expensive and more cost-effective to make existing transportation systems accessible to handicapped persons than it is to create separate special systems."

Department of Transportation concluded that permitting a special-service-only approach would necessitate "significant regulatory and enforcement efforts."

In an August 14, 1988 correspondence to Marca Bristo, George Bush stated, "We are aware that if the employment potential of people with disabilities is fully realized, paratransit services simply will not be able to accommodate the numbers involved."

On February 13, 1989, a Federal appeals court ordered the U.S. Department of Transportation to require transit authorities to equip all newly-purchased buses with lifts and provide paratransit services.

Now let's drop back from fact and look at a little fantasy. The American Public Transit Association, Greyhound, APA would have you believe that things couldn't be better. There are a lot of people out there who would have you believe that access only affects or benefits people with disabilities. Access affects us all.

There are a lot of people out there who would have you believe that the public participation outlined in the current regulations worked and is working. I would encourage you to talk to people in Gainsville, FL, Savannah, GA, Charlotte, NC, Tulsa, OK, Omaha, NE—and I can go on—I can tell you that the public participation programs in the current regs were abused and misused. Public transit authorities around this country led us to water, expected us to drink it, knowing what it would taste like.

Now let's talk about reality. Most people with disabilities do not have access to private transportation. If the original mandate had remained in effect—and I want to go back—the original mandate—if it had remained in effect, every bus in this country would have been lift-equipped by 1991—if it had remained in effect.

Instead, what do we have? Inconsistency in approach, court action and controversy continue. Chicago Transit Authority was forced through litigation to provide access, contrary to what the Secretary of Transportation Samuel Skinner says; they were forced to the table by litigation in Chicago.

The City of Portland was forced through litigation to deal with the issue of access.

The City of Detroit was hit with a $2.1 million judgment for failure to provide accessible public transit. Six people with disabilities filed the original lawsuit. The number of plaintiffs has grown to 1,100 people.

Cincinnati's Queen City Metro bought 87 lift-equipped buses in 1991, over 100 in 1986. Over half the fleet is now lift-equipped, but Metro doesn't choose to use their lifts; they are bolted and nonoperable. Why? Because local option makes that legal.

In Tulsa, OK, the system tried to control ridership on their paratransit-only system by increasing fares. If we don't want to provide total access, and we have too many people using paratransit, what do we do? We increase the fare to drive down ridership. And that is what Tulsa, Oklahoma Transit Authority attempted to do.

Washington, DC's Metro has a 50-percent policy—not only does it have a 50-percent policy, but it is only committed to buying every other bus until it gets to 50 percent. It is an insult.

Houston, TX, paratransit-only, seven days' advance notice required. Once again, I go back to why I was late. I guess I would have been here a week from now to testify in Houston, Texas.

I am from Atlanta, GA, and Atlanta committed to 100 percent in 1987—and they didn't do it because they wanted to; they did it because they were forced to. However, it will be the year 2000, 27 years after the passage of 504, before I can ride the same buses as you and before I have access to the same choices as you and before I might have access to the same opportunities as you—27 years after the passage of Section 504.

I am not aware of any city whose paratransit-only approach accommodates out-of-town guests. Clearly, local option means no option. Clearly, unemployment of people with disabilities will remain unacceptably high until transit is totally accessible. Clearly, action speaks louder than words.

When accepting his party's nomination for President, George Bush said: "I am going to do whatever it takes to make sure the disabled are included in the mainstream. For too long, they have been left out, but they are not going to be left out anymore." On April 10, 1989, this Administration filed a petition to re-hear a case ordering all new transit buses to be lift-equipped and paratransit service provided. Clearly, action speaks louder than words.

On April 7th, in a meeting with the Secretary of Transportation, I was informed by the Secretary of Transportation that this is not a cost issue; this is a mainstream issue. I was informed by the Secretary of Transportation and corrected by the Secretary of Transportation that paratransit-only cannot meet the need; it has to be a combination of services.

Some of us in this room have just returned from four days of public protest in Philadelphia, where oral arguments were presented related to that case. Three years after we filed the case, we have started all over; 16 years after the passage of Section 504, the Department of Transportation and this Administration are still fighting the inevitable.

Clearly, we need to mandate access in the public and private access sector. None of Greyhound's vans or buses—over 4,000—have lifts. Instead, they have "the Helping Hands program"—otherwise marked, you bring somebody to carry you on.

And guess what, Mark? That electric chair you are in, that battery-powered wheelchair you are in—we won't transport it at all.

That is Greyhound's definition of service to people with disabilities.

Mentioned in Greyhound's own testimony is that services that Greyhound provides are crucial to the rural community, and to imply in their statement that it is not important to people with disabilities in those rural communities is absurd.

Accessible hotel shuttles from airports for all intents and purposes don't exist—the exception is the rule. And when is the last time you took a trip on an accessible chartered bus?

My and ADAPT's commitment are clear. In 1981, I made a commitment to the struggle for accessible public transportation. The reason was that my private vehicle was put out of commission for two months, and I was forced to use public transit in Denver, Colorado. I lived in the suburbs by choice. It would take me three transfers and an hour and a half to get to work; whereas if I could access express service at the park-and-ride, I could be there in 20 minutes. Because the original mandate was not upheld, the Denver Regional Transportation District at that time was going to try to back off its commitment to access because it was legal to back off their commitment.

So I was arrested in 1982 for chaining myself to a rail in the lobby of the Denver Regional Transportation District's administrative offices because they didn't want to provide accessible express service—and it was legal—because they didn't want to make a commitment to people with disabilities.

Some of us in this room have been arrested repeatedly since 1983 because the American Public Transit Association denies our right to freedom and dignity. We will continue our efforts. We will ride.

We ask you to be part of the solution. You must act swiftly and righteously to enact the Americans with Disabilities Act, and you must stop the Department of Justice from appealing the Third Circuit's decision to mandate total access to public transit.

Thank you.

Senator HARKIN. Thank you very much, Mark.

[Applause.]

[Prepared statement of Mr. Johnson appears in the appendix.]

Senator HARKIN. I have one question for all of you. On the next panel, we have a witness who states in his written testimony that, "national ridership statistics indicate that people with disabilities overwhelmingly prefer paratransit service"—I am just telling you what it says—and that "paratransit provides the best services for the greatest number of people."

I want to know what your opinion is on that, and I also want to fold into that that in that testimony he explains the various justifications for paratransit systems, including hilly terrain, no sidewalks on roads, a very small number of handicapped persons in a community, lack of shelters at bus stops, lack of a hard service on which riders may stand at the bus stop, et cetera. Those are some of the reasons that he gives for having paratransit, plus making the statement that people with disabilities overwhelmingly prefer paratransit.

So I would just throw that out to you and ask for your response on that.

Mr. JOHNSON. My first response is it is not an either/or question. Why the Department of Transportation, this Administration and the previous Administration, want us to believe that this is either/or is beyond my comprehension. This is not an either/or—would you rather be picked up at your door and dropped off at your place of business by a public transit authority—what would you prefer, that or going out to the stop, and what would you say?

Senator HARKIN. I want to be picked up at my door.

Mr. JOHNSON. Right. The reality is, and it has been proven statistically, that if we were to do that in public transit, and it were cost-effective, we would be doing it for everybody, including you and including me.

The other reality is that in the oral arguments yesterday, the attorneys used those same arguments, and they mentioned several cities. They said in Phoenix, it is too hot, and people in Arizona prefer to be picked up at their door. Two weeks after ADAPT left Phoenix, AZ in 1987, they committed to total access.

That same attorney yesterday said it snows in Colorado Springs, CO, and people with disabilities don't want to wait in the snow like other people might wait in the snow. I just mentioned what Denver, Colorado's commitment was to access, and it also snows in Denver, which is only about an hour down the street.

Senator HARKIN. They will have total access by 1991?

Mr. JOHNSON. By 1991, they will have 100 percent lift-equipped, fixed-route fleet with supplementing paratransit services for those who need it.

So those are some of my initial responses.

The same oral argument has been used since the beginning of this issue.

Senator HARKIN. Mike, do you have anything to add to that?

Mr. MCINTYRE. Living in New York City, we have a similar type of set-up, where it is a multi-mode approach, where we have 65 percent of the bus fleet that is accessible, and key subway stations that are being renovated. Right now, there are three usable stations at this point, and in June there will be a paratransit program.

The reason for the multi-mode approach is that obviously, one mode does not meet the needs of the people given the geographical layout, the nature of the person's disability. It snows in New York City, too, and it gets hot in New York City.

When I was getting my master's degree, I was taking three buses, going from the Bronx to Manhattan, a 3-hour journey. In the winter, I was at bus stops, no shelter, but like everybody else, in the winter you wear a coat, you wear a hat, you wear gloves, you wear a scarf. It is the only affordable means of getting there. When you get out of a class in a master's program, and you get out at 8 p.m. at night, there is no paratransit. I don't know any paratransit system that runs until 8:00 at night during the week.

If you should get delayed, or you've got to go to a library, the only means of transportation you have is public transportation. For some people, public transportation doesn't work. But again——

Senator HARKIN. Excuse me. Let me ask you this, Michael, or all of you. Paratransit systems obviously vary in their applications. I have been told, for example, that in some places that have a paratransit system, if a disabled person had a girlfriend or a boyfriend or a friend or maybe an out-of-town visitor visiting, they would not be able to use the paratransit system. I see heads nodding. Does that happen a lot.

Dr. FLETCHER. Yes.

Mr. MCINTYRE. That is true, I think, depending on the demand. If there is no room, your companion—a girlfriend, a sister, or an attendant—might not be able to ride with you. They might have to get there on their own.

It is interesting, too—I don't remember if Mark mentioned this—but in Chicago, they have been for years utilizing a paratransit program, and they are now moving toward a multi-mode, an accessible main line system, realizing that the paratransit program does not meet the needs of all the people. The demand more than the program can provide service too. So obviously there has to be a multi-service approach. And if there are buses, and bus service is being run, it is more cost-effective to make it accessible

Senator HARKIN. Thank you.

Dr. Fletcher?

Dr. FLETCHER. Let me speak to two levels on that, please. In the rural area where I come from, the only paratransit we have available is through the Administration on Aging, and of course, it is age-restricted, and only for a doctor—for example, I am currently trying to arrange in the county in which I live volunteers to take people to even buy their groceries. So to say paratransit even if we could get it in a rural area, would serve for people who need to work is absurd. I mean, it doesn't even approach it.

In Knoxville, which is 26 miles away from me, we have paratransit, and it will only take people to a doctor's office or things like that, and you have to schedule it seven days ahead of time. So it is absolutely no alternative for people being able to get to work especially.

Senator HARKIN. Laura, did you have anything to add to this at all on the transportation, on the paratransit?

Ms. OFTEDAHL. Basically, I did outline the problems that blind people have riding fixed-route systems, and that in some instances getting to a fixed-route system is a real problem, many times because there aren't stop lights or a good route to get there, or maybe the people don't have proper orientation and mobility training to find the bus stop. But I would say overall, blind and visually-impaired people would prefer, everything else equal, to ride regular systems so that they can come and go when they want to and do not have to plan their trips 24 hours or seven days in advance.

Senator HARKIN. Senator Kennedy?

Senator KENNEDY. Just one question, and I think I am aware of your answer.

This legislation covers the areas of communication, public accommodation, and employment. If we don't have an effective program in the area of transportation, how meaningful is it that we pass the rest of the bill?

Mr. JOHNSON. I think the unemployment rates speak clearly, and they really haven't changed, and they haven't changed because accessing employment, you have to be mobile, and if you are not mobile, you don't access employment. And the reason we are not mobile is because public transit is not totally accessible.

Senator KENNEDY. Michael?

Mr. MCINTYRE. In New York City, for wheelchair users who, for whatever reason, are unable to use buses or do not have a car of their own, to pay for van service out of your pocket to go from one bar to the next, it is an average of $30 plus the tow. I don't know what job an average college graduate can get a salary so that you can pay $60 round-trip daily. It is just not affordable.

Senator KENNEDY. I would ask the last two witnesses, would you agree with me that even if the other provisions are passed, if you don't provide an effective transportation system, you diminish dramatically the progress that could be made in the other areas of employment, public accommodations and communications.

What would you say, Laura? Would you agree?

Ms. OFTEDAHL. Yes, I would definitely agree. For blind and visually-impaired people, driving is just not an option; and so to access employment or anything else is all dependent upon transportation.

Senator KENNEDY. Dr. Fletcher?

Dr. FLETCHER. If you do not pass a strong transportation section, I would venture to say that I don't think it would be worth very much.

Mr. MCINTYRE. If I just might add, in my testimony I made reference to the civil rights struggle for Black Americans and the significance of transportation in that struggle, and here it is for us. It is the center of our struggle for our civil rights.

Mr. JOHNSON. I would go back to when you talked about the sidewalk issue. You know, I kind of resent the transit authorities 'trying to make another access issue a transit issue. And when they throw those kinds of things in there, that is exactly what they are doing.

Also, when they give you ridership figures, I would strongly encourage you to ask them how many different riders that is per day and how many of those riders use wheelchairs. I think you will find, like we did in Atlanta when we asked those questions, that those ridership statistics dramatically dropped into 78 different people per day for $900,000 a year.

So when someone throws that at you and says, "This system works, and we do 100,000 of this"—how many different people is that, and how many of those people use wheelchairs? You are going to find some real interesting statistics then.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator HARKIN. Senator Durenberger?

Senator DURENBERGER. I will be brief. We haven't heard from the transportation system panel yet, but in your opinion—of everybody on this panel—do you think the objection to this part of the bill comes down to cost or does it come down to a philosophy, like people prefer something that we don't have? Is it fair to say that at bottom, most objections to this bill are just that it is going to cost something to achieve?

Dr. FLETCHER. Senator, I'd like to respond to that.

If you are isolated by your family, by your community, by economics, by even your religion because you can't get into a church, but the main thing is you are isolated by your economics, if you cannot access a workplace, you cannot work, and you cannot pay for those things.

Without transportation in vast areas of the Southeast—and I can just say for there—there is no use in saying that we will make jobs available if you cannot get to them. Yes, it is a philosophy. It is the only way that I can see that we are going to be able to pull people out of that draconian isolation that most of us have faced all of our lives.

Senator DURENBERGER. I think I understand that part.

Mr. JOHNSON. Public transit used to be so heavily subsidized, that actually, the transit authority would have preferred that nobody ride, the reason being that the equipment wouldn't be used much, and therefore it wouldn't have to be maintenanced much, they would always be on time, and in addition to always being on time, there would never be any user complaints, because there would never be any altercations between the drivers and the users.

So the reality is that when a system is forced to provide total access, it has to become incredibly accountable. Otherwise, drivers need to know how to relate to people; maintenance people need to know how to maintenance buses; route folks need to know how to schedule routes. And the reality is that the transit authorities don't want to provide accountable service. And all of a sudden, when you have to provide accessible accountable service to people who totally depend on that, then all of a sudden they become reluctant.

It is not a cost issue. And I could sit here and talk about the fact that it is a civil rights issue, but the reality is that it is not only the right thing to do; it is the best thing to do.

Senator DURENBERGER. I interpret that to mean that they get paid for running on time, and it takes a little longer to access a person who is mobility-impaired, which will throw off the schedule. Does that get to be the answer that is communicated?

Mr. JOHNSON. Oh, I think it has been expressed before—that is going to cut into the driver's allotted time for a bathroom break, and then we are going to have to deal with the union on that. So what they are doing is they are taking these other issues once again, and they are blaming disability, and they are trying to make those issues the reason not to do what they need to do. And they are historically good at doing that.

Senator DURENBERGER. The only other question I have is the rural question, and I think it relates. The problem of access in rural areas is probably a little bit more likely to be cost-related than it might be in an urban setting. I don't know whether I agree with Mark or not on this issue; I am not smart enough to figure out whether he is right or wrong. He has been at this much longer than I. But my experience in rural America would say that there is probably a little bit more sensitivity there, and that the major obstacle might well be the cost, not only on the transportation end, but in some of the other things that are covered by this Act.

Is that an unfair conclusion to come to?

Dr. FLETCHER. If one assumes that we are talking about equality, which is if the able-bodied person has access to transportation, therefore we assume—I do—that we are going to fight for equal access. But when there is no transportation to anyone, then it would be unequal to say we have to have it in lieu of. Okay. However, most people do not realize that we do have transportation in rural areas. We have Greyhound fixed-route buses which we cannot access and cannot get on, and as he noted—I nodded my head when you said that, because they wouldn't let my wheelchair go with me—so what good is my going if I can't take my wheelchair? Then we have Amtrak in the Pacific Northwest, so we do have some—what we are fighting for, of that which we have, please let us have equal access to it——

Senator DURENBERGER. I am trying to get at how do we solve the problem even beyond legislating a solution to the problem. And I am hearing that in urban areas, it is a bigger problem than cost. There is an insensitivity, there is a "don't rock my boat, I've got to keep up with my schedule," or whatever it is problem—anything that is unpredictable during the day sort of throws everything off. I hear that. But in rural areas, I am assuming—and I need you to tell me whether I am right or wrong. Even a large community like Rochester, Minnesota, which is fairly sophisticated, went through this whole argument over $10,000 a bus or something like that. Ten thousand dollars doesn't seem like a lot. If Rochester didn't have it or something like that, that would be one issue. But it seems to me they were dealing with the cost; they weren't dealing with inconvenience and a lot of other issues, and a lot of smaller communities would be dealing with cost, would they not?

Dr. FLETCHER. It would be first cost if we were trying to provide public transportation to all in a rural area. But there is one thing which I did not bring up, because it is not part of this bill, ADA, but the irrationality with which Federal-State services are given—for example, if you have the Administration on Aging busing, or you have the Department of Mental Health, which has busing for those who are mentally disabled, and we cannot access those, it seems to me that one, as far as rural areas, could in a very small way begin to look at some of this irrational services delivery and pull together those, and then many of us might be able to get on their vans.

So I did not bring it up because it is not a particular part of this bill, but there are some solutions to rural transportation problems—not total solutions, but at least approaches—and one of the things would be to let us have control over some of these Federal programs when we are trying to deliver our services.

So the first consideration would be cost in rural areas if we were going to add additional transportation.

Mr. JOHNSON. I don't want to totally agree about the cost, because the reality is that that rural community is getting the same amount of subsidy that the urban community is getting as it relates to this Act. If you are providing Federal financial assistance to a transit authority——

Dr. FLETCHER. We don't have a transit authority.

Mr. JOHNSON.—ou are providing percentage-wise the same.

Dr. FLETCHER. We don't have one.

Mr. JOHNSON. If you are providing 16(b)(2) money to an rural community, you are still providing a potential type of funding source that could be used for the service.

Gainsville, Georgia has a paratransit program for everybody—everybody has to call in advance in Gainsville. The reality is the total paratransit fleet legally does not have to be totally accessible. I don't think it is so much cost, and I don't like somebody placing a value on me as a person and what I can provide my community, and if cost is your real concern, quit this drastic over billion dollar cut in transit, but mandate to the transit authorities how it has to be spent.

I am not coming to you and asking you for more money with APTA until APTA is willing to guarantee me how they are going to have their transit authorities spend it.

Senator DURENBERGER. Well, that is the issue I was getting at. I mean, the reality in small-town rural America today is that they don't even have the $10,000. I mean, the matched percentage may be the same, but they don't have it; they don't have it for education, they don't have it for a copy in the streets; they don't have it to help pay the volunteer fire department. They don't even have it to begin with, which is why it is important to me as a Senator to get to the heart of that, because maybe we ought to treat rural America differently from the way we treat big cities, where they do have a few options.

Dr. FLETCHER. I do hope that I have not given the impression that in all areas—for example, some State and local governments are saying that the ADA would be too expensive at the local level. I absolutely want to refute that, because over a period of time our biggest problem has not been cost, because a community, as you know, a rural community, will pull together to do a lot of things, and one of the things that they have been able to do has been like curb cuts and things like that. So except in transportation, I think that is the only real cost that we are talking about in rural areas in regard to the ADA.

Senator DURENBERGER. Thank you, Mr. Chairman.

Senator HARKIN. Senator Simon?

Senator SIMON. Yes, and I apologize for being in and out, but we are having a markup in the Foreign Relations Committee.

I heard Mark Johnson and Michael McIntyre use the civil rights analogy. It is very interesting for me. We had back 15 years or so ago in Chicago a dispute about public transportation, and the question was how do you get public transportation for the people from the black and Hispanic west side of Chicago and the south side of Chicago so you can get them to the suburbs where the jobs are. These are people who have all their motor skills, have the ability to get around much better than some of the people in this room. And if it is a civil rights question—and I do not suggest it was not—to see that they get access, it is also a civil rights question for another group with a higher unemployment rate, and that is what this hearing is all about.

It seems to me the fundamental question that we have to face is do we deny transportation to those who need it the most. That is the fundamental question. And I think when you pose that question properly, you in fact answer that question. And I appreciate the testimony of the witnesses here, and I regret that right now, I am kind of in and out.

Thank you, Mr. Chairman.

Senator HARKIN. Thank you, Senator Simon.

I might just include this in the record at this point. I just had a message sent up from Justin Dart, who is chair of the task force on empowerment of Americans with disabilities, who is former head of the RSA. He said that, "Last year, I presided at 63 public forums in all 50 States where more than 8,000 person with disabilities and their advocates participated to express their views on ADA. I do not recall one, single individual who stated a preference for paratransit in the sense that public transportation should not be required to be 100 percent accessible. I recall virtually unanimous support for 100 percent accessible public transit with paratransit as a supplement."

Does that sound in accordance with what you are expressing here today, too—I will insert that letter in the record.

[Statement of Mr. Dart appears in the appendix.]

Senator HARKIN. Thank you all very much for being here today and for your fine testimony.

I can assure you this committee takes to heart what you have said, all of you in response to Senator Kennedy's question that transportation is really an essential, essential part of this bill.

So thank you all.

Senator HARKIN. Our next panel is a fairly large panel. I will read their names off: J. Roderick Burfield, Virginia Association of Public Transit Officials; Harold Jenkins, Cambria County Transit Authority, Johnstown, Pennsylvania; Dennis Louwerse, American Public Transit Association, Reading, Pennsylvania; Charles Webb, American Bus Association, Washington, D.C.; James Weisman, Eastern Paralyzed Veterans of America, New York; Tim Cook, National Disability Action Center, Washington, DC

Welcome to the committee. Again, I would appreciate it if you could summarize your statements as much as possible. It is my intention again to hear from all the witnesses, and then we will open it up for questions as we did before.

And again, your testimonies all will be made a part of the record in their entirety.

So welcome, and we'll start with J. Roderick Burfield, Virginia Association of Public Transit Officials. Welcome to the committee.

STATEMENTS OF J. RODERICK BURFIELD, VIRGINIA ASSOCIATION OF PUBLIC TRANSIT OFFICIALS; HAROLD JENKINS, CAMBRIA COUNTY TRANSIT AUTHORITY, JOHNSTOWN, PA; DENNIS LOUWERSE, AMERICAN PUBLIC TRANSIT ASSOCIATION, READING, PA; CHARLES WEBB, AMERICAN BUS ASSOCIATION, WASHINGTON, DC; JAMES WEISMAN, EASTERN PARALYZED VETERANS OF AMERICA, NEW YORK, NY, AND TIM COOK, NATIONAL DISABILITY ACTION CENTER, WASHINGTON, DC

Mr. **Burfield.** Thank you, Mr. Chairman.

My name is Rod Burfield. I am here representing the Virginia State Transit Association. Before I begin, I'd like to explain that my remarks today represent the position of the Virginia Association of Public Transit Officials and not the position of my employer, the Washington Metropolitan Area Transit Authority. I am an officer of the State Transit Association and speak with that hat on today.

VAPTO consists of 20 transit properties in Virginia. We run the gamut from large urban areas, medium urban areas, small urban areas, rural fixed-route bus systems and rural van systems, including a van in Appalachia, the far southwestern tip of Virginia, to as small as that.

As such, we think that Virginia is in a sense a microcosm, as it were, of transit nationally, and I'd like if I might to describe how Virginia has dealt with the whole issue of disabled transportation over the last 10 or 15 years.

VAPTO strongly supports public transportation for the disabled. In 1988, our association spent over $11 million directly on disabled transportation services, provided over 815,000 disabled trips. Als in 1988 under a new State program, which I'll describe in more detail a little bit later, an additional $1.8 million under a special program was spent for disabled services.

The improvements in transportation for the disabled, Mr. Chairman, that your bill seeks to achieve are laudable. It has been our experience in Virginia, however, that some of the rather broad sweeping mandates in the bill may fall victim to the laws of unintended consequences. And with your permission, Mr. Chairman, I'd like to describe a couple of those very briefly.

As you know, frequently what happens with omnibus bills is after two or three years of the legislation being in effect, you go back and you discover that the consequences were not exactly what was initially intended, or the bill may have created additional problems which were never forecast at all.

Mr. Chairman, you described before a portion of my remarks in one of your questions to the prior panel, so if you don't mind, in the interest of time I am going to skip over some of that. However, I would like to point out that the varying local conditions in Virginia require the transit agencies to come up with their own version, their own twist, of local responses under existing legislation, which is essentially local option. They are required right now to provide either fixed-route lift-equipped services or paratransit, or they may do both. And I think that this is true nationally, particularly in the rural areas. As an example, I referred to Wise County, Virginia, which is in the far southwestern tip, in what is commonly known as Appalachia. Under the special program that was started in Virginia in 1988, where capital projects for disabled transportation receive a 95 percent State match, which is far higher—it is about 25 percent higher than a standard public transportation capital grant, an approved grant. As a result of that, Wise County purchased under this program one special van to provide, for the first time, transportation of this type.

This is the kind of positive incentive legislation that we think works very well. The legislation that is being considered here today, since Wise County did not have any paratransit, does not have a fixed-route bus system, would not have helped at all. We would like to offer that for your consideration.

There are two other major problems that we see with the current language of the legislation. One is that the legislation requires a fixed-route transit property to also provide paratransit comparable to the service that fixed-route riders currently receive.

In Virginia—and I cannot speak for any other States; perhaps some of the other people on the panel can refer to this—but in Virginia, this would be a degradation of existing paratransit services. All transit properties usually have a fairly large service area. They do not provide fixed-route transit service, however, to that entire service area. The service is targeted to where the greatest ridership is and to the employment areas.

Under the language of the bill, the only requirement would be that the paratransit system provide comparable service to what the fixed-route riders have, which is reduced hours, evenings and weekends, 60-minute headways, that kind of thing, literally would be a substantial degradation of existing service.

The other fact that is happening nationally and in Virginia and has been accelerating in recent years is the phenomenon called "dumping". For those of you who are not aware of this phenomenon, "dumping" is the process whereby a social service agency that heretofore has been providing transportation services for their clientele simply "dumps" the transportation of their clientele onto the transit agency. This is usually done either formally, by a letter—and attached to my formal testimony is a letter illustrating what happened in Richmond last year—or they just simply say, "We can't provide the transportation anymore. Here is how you order a paratransit van, or here is how you get a fixed-route bus"—and they leave their clientele kind of hanging high and dry. Many of their clientele may not live near a bus route, may not understand how to use the paratransit agency, and it causes substantial problems.

I would like to close by describing precisely how Virginia has dealt with this problem over the last two years, and we would hope that the Congress and this committee would consider some of the things that we did.

Two years ago, there was a bill introduced in the Virginia General Assembly that required 100 percent accessibility for fixed-route buses, and it was quite controversial. It became clear pretty quickly that this was pretty counterproductive; there was a big fight going on. It also became clear that some sort of an incentive method was a much more effective method to come up with.

What we came up with was the program I referred to a moment ago, a special match percent, 95 percent, for disabled transportation capital grants. As a result of that, in the first year—and this was kind of put in very quickly and stuck onto the end of the normal capital grant program—over $1.8 million in grants were approved all over the State, from large urban areas to very small rural areas, and for various things, for lift-equipped buses, for vans, for various things. What also happened was the Virginia was praised by the President 'Committee on Employment of People with Disabilities for—and I quote—"providing the lead for other States by acting to reduce a major impediment to employment for many people with disabilities."

The second thing that happened was the following year, my association and representatives of the disabled community met in about mid-January this year, 1989, because there was still a feeling that what Dr. Fletcher referred to before, and some other things, that these various Federal and State programs, people dropped through the cracks. It gets a little bit frustrating, with the coordination of the programs, to try to get together and see if we could start a process by which the transit providers, the transportation professionals, and the disabled advocates and social service agencies responsible for programs to help these people could work together to see if we cannot on our own voluntarily solve a lot of these problems by agreement.

What we came up with was a resolution that is attached to my formal testimony—I believe it is the last sheet attached to it. All it does is set in place a process that will be voted on by my State association at our annual meeting which occurs in about two weeks; I can assure you it will be approved, and it will be then referred to the other agencies, and we hope to have our first meeting to do this by the end of the summer.

We in transit in Virginia believe that the application of a little creative common sense almost always is the best formula to deal with problems like this. Because of the unique local conditions that exist everywhere, a broad mandate frequently is not applicable to certain communities, or even if it is, it does not apply in the ways and provide the consequences, the benefits, that legislators and advocates for better transportation for disabled or for anybody really intend. We would encourage this committee and the Congress to study carefully what we did in Virginia—perhaps a few guides for a more voluntary way to try to do this. We think that the more voluntary you can make any legislative program like this, the longer-lasting and the more meaningful transportation for the disabled and for everyone will be, and will ultimately deliver much better services.

Thank you, Mr. Chairman.

Senator HARKIN. Thank you.

[Prepared statement of Mr. Burfield appears in the appendix.]

Senator SIMON. Mr. Chairman.

Senator HARKIN. Senator Simon.

Senator SIMON. I know I am going out of order here, but I am not able to stay. If I could just ask a few questions to this one witness.

Senator HARKIN. Please.

Senator SIMON. My concern about making it voluntary is that it has been voluntary for a long, long time, and we haven't gotten very far.

Let me just go over the provisions here, just to find out what you oppose and what you do not oppose.

"To require that all new buses, rail vehicles and other new vehicles be accessible." Do you oppose that?

Mr. BURFIELD. In the situation with buses in certain communities it simply will not do the job; that is correct. It is a mandate that will not achieve the benefit.

Senator SIMON. When you say "a mandate that will not achieve the benefit"—for whom?

Mr. BURFIELD. For the disabled. For instance, the chairman referred to earlier—in James City County, Virginia which is a rural county that surrounds Williamsburg and is a rapidly growing county, as a matter of fact, as a result, less than one percent of their roads have sidewalks, are accessible. They have complaints from fully mobile riders. The spending money in that community to provide lifts on buses and maintain the lifts and operate it, in our view, and the straight service delivery and efficiency and productivity and better transportation for the disabled, makes less sense than providing, for instance, a much better paratransit system, let's say, with a six-hour on-call rather than twelve or twenty-four; try to get it as close as possible to the normal transportation service that able-bodied persons enjoy.

Senator SIMON. Well, it seems to me there are two possibilities here, and I am not familiar with that community. But one is to change the technology so you can have access from non-curb areas; and the second is to change the law and say it might not apply in an area where you don't have a curb situation.

Mr. BURFIELD. We would certainly prefer the latter.

Senator HARKIN. I do not mean to get involved in this, either, but just to raise a question—if there are no sidewalks, how do non-disabled people get on the bus?

Mr. BURFIELD. They get mud on their shoes, and complain a lot. It is very difficult.

Senator HARKIN. They walk down the road.

Mr. BURFIELD. They walk in ditches, they walk on the side of the road.

Senator HARKIN. So if they walk on the side of the road, can't someone in a wheelchair put their wheelchair on the side of the road, too?

Mr. BURFIELD. They can.

Senator HARKIN. So why couldn't they put their chair on the road?

Mr. BURFIELD. Well, the other problem is that, for instance, if I live 600 yards from a bus stop, I can quite easily walk to the bus stop. For somebody in a wheelchair who lives 600 yards or half-a-mile from a bus stop, they may be able to do it on a roadway, but in many instances there is no pathway, period, to the bus stop.

Senator HARKIN. I've got to believe they aren't dirt, though. I mean, they must be macadam or asphalt or gravel; they must be hard-surfaced roads. They can't be dirt.

Mr. BURFIELD. James City County does have hard-surfaced roads; they have progressed that far, I believe.

Senator HARKIN. So it is not really mud any longer that we are talking about.

Mr. BURFIELD. No, sir.

Senator SIMON. Anyway, it seems to me that whether it is a one percent or two percent exception, that somehow we ought to be able to accommodate that. And my staff tells me Jim Weisman and Tim Cook of the panel can answer that later. But your answer I assume would be the same on used vehicles and remanufactured vehicles?

Mr. BURFIELD. Actually, I believe that—yes, it would be the same, for the same reason.

Senator SIMON. So basically you are saying because you have a situation where let's just say 5 percent of the buses are in that situation—and I would guess that is a high figure—we should not mandate it anywhere. That is basically your position.

Mr. BURFIELD. Well, the bill as it is currently written, of course, mandates it everywhere, yes, that is correct. I think that it needs to be targeted a little bit better to account for this situation.

The other point I'd like to bring up, Senator, is that you have many instances where you have small rural areas—at least this is true in Virginia—that have very small bus systems, a fixed-route bus system of six, eight, ten buses. And these are bus systems that are kind of hanging on by their fingernails in terms of future local funding. I don't know that this will happen, and I will not represent that it will, but some of us fear that some of these small bus systems in the face of legislation like this might in fact fold up and then just have a paratransit system, period; they will no loner have a fixed-route system for anybody.

To be perfectly fair, I doubt if that would happen a great deal across the country. But I am also convinced that it would happen in some places.

Senator SIMON. And because it might happen in some places, you think we ought to deny access to those who have disabilities everywhere?

Mr. BURFIELD. Absolutely not. All I am suggesting, as I said before, my transit association are very strong supporters of transportation for everyone, the disabled included. We merely feel that the statute needs to be targeted a little bit better to avoid as much as possible some of the consequences that we are convinced, having seen in Virginia, would happen if this bill were passed in its current form.

Senator SIMON. I think you will find this subcommittee wanting to be practical. Where there are changes that are needed, we are willing to make changes, but we don't want to have excuses be a reason for not moving ahead and making transportation more accessible to everyone.

Mr. BURFIELD. You and I have the same goal, Senator.

Senator SIMON. Thank you, Mr. Chairman.

Senator HARKIN. Next, Harold Jenkins, Cambria County Transit Authority, Johnstown, Pennsylvania.

Welcome.

Mr. JENKINS. Thank you, Mr. Chairman, and good afternoon.

My name is Harold Jenkins, and I am the General Manager of the Cambria County Transit Authority, headquartered in Johnstown, Pennsylvania. Johnstown is a small urban community that operates both an urban and rural public transportation system. Our area is an area that is quite hilly, receives a lot of snow, and as you have probably read in the last few weeks, we receive a lot of water through flooding.

I have been asked to testify before this county this afternoon in support of the Americans with Disabilities Act of 1989. My support is based primarily upon our experience in Cambria County with operating an urban and a rural transit system which is 100 percent accessible to those persons confined to wheelchairs and with other disabilities.

We have been operating a totally accessible transit system since 1983. I want to emphasize from the outset that an accessible transportation system will only be as successful as the commitment behind the decision to provide accessible transit.

I believe from our experience that unless management is firmly committed to the laudable goal of accessibility, persons with handicaps stand to be short-changed somewhere along the line.

Let me explain what I mean. The very nature of physical disabilities contributes to the discrimination problems which exist with respect to individuals with handicaps. Many people are uncomfortable in dealing with those who are different. This pattern has contributed immensely to the reluctance of many persons with handicaps to venture out into society in an attempt to join the mainstream.

Consequently, if their fears are met by a transit system which is not seriously committed to providing reliable, safe, accessible transit, their fears will only be compounded, and the discrimination perpetuated.

In Cambria County, we made a commitment from the beginning to provide the best possible accessible system. We believed that only within this degree of commitment would we be able to overcome the building reluctance of many person with disabilities, especially those in wheelchairs, to use accessible transit.

Let me outline some of the steps we took which go beyond the simple provision of wheelchair lifts. From the beginning, we realized the importance of selling the concept of fixed-route accessible transit to potential users. I emphasize the word "selling" for the reasons previously mentioned. Many folks in our community with disabilities were reluctant to utilize an untested form of public transit. Therefore we had to sell it. These effects took many forms,

We initially conducted public demonstrations of the accessibility features of the bus. The local media provided extensive coverage—a vital consideration in any public awareness program.

Concurrent with the bus demonstrations, we inaugurated a program to contact all the organizations in the community who worked with person with handicaps. A very detailed slide show was prepared and presented to these groups, showing every step involved in the boarding and exiting of the bus. We prepared a special publication which highlighted the accessibility components of the bus and a sequence of steps involved in using the vehicles. Thousands of these brochures were distributed throughout the community.

All these efforts helped to assure the passengers with a handicap that public transportation can be a safe and reliable means of transportation—and most important, we showed them that we wanted them to use our service, both our call-and-demand and our fixed-route service.

As a result of our educational efforts, we carried an average of 200 passengers a month in wheelchairs during the first 11 months of operation in 1980—that is 200 per month with only seven accessible buses.

By 1983, our entire fleet of 27 buses was accessible, with the result that we now carry over 3,000 passengers in wheelchairs every year. In addition, we annually transport about 36,000 passengers with other disabilities—and we carry this number despite our inclement weather and hilly terrain. Why? Commitment; a strong commitment to quality transit.

Another important component of our program has been driver training. In addition to receiving basic training in lift operation, all operators receive intensive sensitivity training. Drivers complete a comprehensive course consisting of films, wheelchair familiarity, boarding procedures, securement, and emergency evacuation. Drivers also spend a portion of their training period confined to a wheelchair in order to enhance their sensitivity to the various needs and feelings of passengers with disabilities.

Annual refresher courses are also provided.

Another vital component of our program is wheelchair lift maintenance. There is no worse experience for a passenger in a wheelchair than to arrive at a bus stop expecting an accessible bus, only to find that the lift does not work. A quality maintenance program is critical. Drivers are also required by union contract to cycle their lifts prior to beginning their work day. This procedure has benefits for the mechanical components of the lift. It also assures that operator that he or she has a functioning lift. If it does not operate properly, the operator is prohibited from leaving the garage with that particular vehicle.

All these steps I have just discussed go beyond the letter of the law, but without them, we believe an accessible system will be doomed to failure.

Finally, let me briefly touch upon several objections to accessibility which are frequently raised. One objection concerns cost, the cost of the lift and its maintenance. We are in public transit to provide transit to the public. It is that simple. Persons with handicaps are members of the public. Therefore we view the cost of equipping and maintaining buses with lifts as we do our other expenses: It is the cost of doing business.

But our experience demonstrates that once an honest commitment is made to provide quality accessible service, maintenance costs can be controlled. Our maintenance history over the past nine years has confirmed this point.

With respect to lift cost, the cost per lift will go down as lift utilization increases. And lift utilization will increase as the degree of commitment and quality of services increase. It is the old "as you sow, so shall you reap" philosophy.

Another objection centers on the slowing down of the system due to the extra time it takes to load and unload passengers in wheelchairs. We initially conducted time studies to document this fear. But after six months, we discontinued the studies. The drivers no longer had to fill out the forms because the time factor was seen as insignificant.

We have carried about 15,000 passengers in wheelchairs since 1980 and 1983, and have never received one complaint from ambulatory passengers about time delays due to wheelchair transport.

Another objection cites problems with unions. When a transit system makes an honest commitment from the outset to establish a credible accessible system, union problems will not exist. But if the union senses that management's commitment is lackluster, the door may be opened for problems.

As I said before, our union contract actually requires operators to cycle their lifts prior to their shift. This was an easy clause to get into the contract because the union understands the degree of management commitment. The special training received by operators also reinforces this commitment.

The Cambria County Transit Authority that operates both urban and rural, with a 90,000 service area population in the urban area of Johnstown and a 200,000 service area population in the rural area, has a fixed-route and call-and-demand system in our rural operations, and the system works quite well. It is an integrated system, and the system works quite well also in the urban area.

We from the Cambria County Transit Authority, my board of directors, my staff and my employees are committed to providing the most accessible means of transportation for the disabled in our community, and we support your efforts to pass the proper legislation that it takes to do it.

Thank you very much.

[Applause.]

[Prepared statement of Mr. Jenkins appears in the appendix.]

Senator Harkin. Dennis Louwerse, welcome to the subcommittee. Please proceed.

Mr. Louwerse. Good afternoon, Mr. Chairman.

My name is Dennis Louwerse. I am the Executive Director of the Berks Area Reading Transportation Authority, which is located in Reading, PA.

I appreciate this opportunity to appear before the subcommittee this afternoon on behalf of the American Public Transit Association.

APTA is a nonprofit organization representing local mass transit systems. APTA's members include over 400 North American public and private transit systems which carry over 95 percent of the persons using public transit in the United States and over 430 manufacturers, consultants, academic institutions and Government agencies that are involved in the mass transit industry.

In addition to serving as executive director of the system in Reading, Pennsylvania, I currently serve on APTA's Elderly and

Disabled Persons Task Force. This Task Force was created to ensure that the transit industry continue to meet its obligation to elderly and to persons with disabilities. It has three objectives, which I have fully described to the committee in my written testimony.

APTA and the transit industry have consistently recognized that providing mobility needs of our Nation's elderly and disabled citizens is a major objective and a challenge for public transit systems across the country.

Meeting that challenge over the past few years has been made much more difficult because we have experienced a drastic—and I emphasize drastic—reduction in the Federal transit program of more than 50 percent in real dollars. I should add that still deeper cuts have been proposed by the Administration in the fiscal year90 budget, which if adopted would force major service cutbacks for all citizens including the elderly persons and those with disabilities.

Our current industry policy, which is now being reviewed by the APTA task force, is that each community should be continued to be permitted to determine the best way of providing service to the elderly and to those with disabilities by tailoring service to diverse needs, circumstances and desires of the local community.

We believe that the decisions on the appropriate mix of transit services for persons with disabilities should be based on consideration of all factors that are set forth and described in my written testimony—but I would like to emphasize that we should consider the views of disabled persons and others in the community actually being served; we should consider the unique features of each public transit system and the environment in which it operates.

Under our policy, we believe that the transit industry has demonstrated a solid record of achievement in providing service to the elderly and persons with disabilities. Certainly, I will be the first to admit that improvements can be made. However, I think it should be noted that on an industry-wide basis, we commit some $850 million per year, or 6 percent of our national operating budget, to this service. Virtually every transit system in the country provides services for person with disabilities in one of three ways—either fixed-route lift-equipped service utilizing service with wheelchair lifts, or demand-responsive or paratransit service offering door-to-door service in smaller vehicles that are specially-equipped with the needs of the disabled in mind, or finally, a combination of lift-equipped fixed-route service and demand-response service.

I should also say that it is important to note that the percentage of lift-equipped buses in our national fleet—and the national fleet is approximately 57,000 vehicles in the country today—has grown significantly during the 1980s. We estimate that in 1993, approximately 53 percent of our buses will be lift-equipped. This increase in the number of lift-equipped buses has come despite—and I emphasize despite—a dramatic cutback in funding of Federal transit programs.

In addition, we are proud to point out that new, fully-accessible rail systems are now operating in a number of communities: San Francisco, Washington, Atlanta, Miami, San Diego, Pittsburgh, Buffalo, Sacramento, Portland, and San Jose. And a number of new rail systems are now under construction or in the planning stages, and they will also be fully accessible.

With respect to older system accessible, improvements are being made and incorporated into these systems as they undergo modernization. I should offer one very positive examples is New York City, where the Metropolitan Transportation Authority and representatives of persons with disabilities have agreed—I emphasize have agreed—under State legislation to designate a number of stations as "key stations" that will be made fully accessible as part of the stations 'modernization program.

To further illustrate the scope and diversity of services for the elderly and persons with disabilities that are being provided, my written testimony provides details on a number of successful local programs including San Diego, Iowa City, Duluth, Memphis, suburban Chicago, Cleveland and Seattle.

I would like to give you specific details concerning my own system which is found in Reading, Pennsylvania. The Berks Area Reading Transportation Authority, which is known as BARTA, developed the first specialized transportation in Pennsylvania back in the early 1970's, and the third specialized transit system in the United States. BARTA services a population of 172,000, and we currently provide 1,300 rides each day through our paratransit program. BARTA has 22 paratransit vehicles, and 14 of the 22 vehicles are lift-equipped. BARTA also uses three private contractors for paratransit service on an as-needed basis. But I should point out that BARTA recently purchased 15 new buses for its fixed-route system, and 10 of these buses will be lift-equipped. We also anticipate two other bus replacement projects and in addition, 10 more of each 15 replacements will be lift-equipped.

In addition to our members providing services to persons with disabilities, APTA's task force services on a national steering committee of Project ACTION, which is Accessible Community Transportation in our Nation. Project ACTION is a direct result of congressional mandate to better accommodate the transportation needs of people with disabilities. The 3-year congressional program has authorized up to six demonstration projects nationwide to evaluate and improve transit accessibility, and it is administered by the National Easter Seal Society.

Mr. Chairman, as you know, the services provided to persons with disabilities are governed by regulations issued by the Department of Transportation. There is one section of those regulations which I believe fully illustrates the strength of existing systems. The regulations mandate public participation and coordination in planning of services for persons with disabilities. Each community is required to consult as early as possible in the planning process with handicapped persons and groups representing them in order to identify the needs for service in the area by the local transit authority. Any weaknesses or problems in the existing service and the types and characteristics of service to be provided by the local transit authority.

Regulations further provide that local transit authorities provide a mechanism for continued public participation in the development and operation of its system of transportation for handicapped persons.

The significance of this requirement, Mr. Chairman, is that specific solutions are not being mandated by the Federal Government. Rather, local transit authorities along with disabled communities that they serve are working together to create transportation programs that are workable and successful at the local level.

Mr. Chairman, the membership of APTA is aware of its responsibilities to carry out the national policy as directed by Congress. If Congress chooses to mandate all the requirements set forth in this proposed legislation concerning mass transportation services, we would urge that it provide the financial assistance to ensure that its mandate can be carried out. Limited funding forces increasingly difficult choices, especially for the smaller operator, and the use of available resources to provided services for the people who are elderly and disabled.

Mr. Chairman, I personally am fully committed to full accessibility. However, just as I would not try to tell Mr. Jenkins, who is my good friend and colleague, what he should do for the benefit of his community in Johnstown—I wouldn't tell him how much his fare should be—he would not tell me what I should do for the benefit of my people in Reading. I must deal with the disabled people in my town, and we together must work and develop the best way to solve our transportation needs on a local level.

I thank you for this opportunity to make these remarks to you today.

Senator HARKIN. Thank you very much.

[Prepared statement of Mr. Louwerse appears in the appendix.]

Senator HARKIN. Next, we'll turn to Charles Webb, American Bus Association.

Mr. WEBB. Mr. Chairman, members of the subcommittee, my name is Charles Webb. I am counsel for the American Bus Association, which is a national trade association for the intercity bus industry.

Except for a few passing references to Greyhound, I think all of the references made in these hearings today have been to buses operated by recipients of Federal financial assistance who use transit coaches.

Our bus transportation is provided by privately-owned bus operators using over-the-road coaches. And the differences between the two industries is such that legislation acceptable to one sector might be radically unacceptable to the other.

But we do believe that all Americans should be able to use all of the transportation services offered by the intercity bus industry, including disabled Americans confined to wheelchairs, and to achieve that objective without denying essential bus service to millions of other Americans, the transportation provisions of Title IV must be amended substantially.

There are three major problems to be resolved. First, almost all of the intercity buses used in scheduled service and in charter service are equipped with restrooms. The aisle of an intercity coach is only 14 inches wide. If the restroom must be accessible to a passenger in a wheelchair, 11 or 12 seats must be sacrificed. Neither fixed-route nor charter service can be operated profitably with a loss of 25 percent of bus seating capacity.

Since the bill is intended to ensure that buses are fully accessible, we assume it would require the bus interior to be fully accessible. This seems to be confirmed by the general prohibitions in Title I of the bill. Sections 101(a)(1)(c) and (d) define as discriminatory "providing a service that is less effective than that provided to others and providing a service that is different or separate".

Second, the bill requires that new vehicles other than automobiles purchased 30 days after enactment of the bill must be made accessible. But it is not necessary to require all of the buses, minibuses and vans used in charter or special service to be fully accessible in order to guarantee full accessibility to such service by disabled Americans in wheelchairs.

For example, Carrier A, who operates 50 buses in charter service, may be able to satisfy the request of charter groups by owning and operating only two or three fully accessible buses. Such a carrier ought not to be put to the enormous expense of installing lifts on 48 buses which will never be used.

Similarly, Carrier B would probably find it not feasible to make its entire fleet of small vehicles fully accessible, but that carrier might nevertheless be able to meet all of the vans for accessible service with only two or three such vehicles in its fleet.

The charter service problem might be solved if Paragraph 3 of Section 403(b)(3) of the bill were amended along the followings lines: to define discrimination as "the provision of transportation service, other than general or special service for the general public on a regular and continuing basis; the provision of transportation service on and after such-and-such a date that is not readily accessible to and usable by individuals with disabilities including individuals who use wheelchairs".

In other words, speaking now only of charter and tour bus operators, if such operators provide an absolute guarantee that they will provide fully accessible buses to groups who desire such buses, that would seem to me to be sufficient.

But finally, for scheduled intercity service, it would be necessary to install lifts on all of the buses used in such service. The major costs in addition to those associated with restroom accessibility are: $35,000 for each wheelchair lift; maintenance costs of approximately $2,000 a year; and a loss of up to $63 million in annual package express revenues due to the reduction in the size of luggage compartment space.

Now, unlike Mr. Jenkins and his Cambria County Transportation Authority, our expenses are not covered by the Federal and local governments. We must pay our way out of the farebox. And such expenses as I have indicated would make regular route service, now only marginally profitable, hopelessly unprofitable. So the ultimate cost of the proposed legislation as written would be paid in loss of service to most or all of the 9,000 communities where the intercity bus is the only form of public transportation, and in the loss of service to persons who, although able-bodied, have limited access to public transportation because of rural residence or poverty-level income, or both.

With respect to scheduled intercity bus service, we urge that the Massachusetts bus lease program be studied to ascertain whether it could be adapted to scheduled bus operations nationwide.

Mr. Chairman, I would like to offer for your record an explanation of the Massachusetts program which just recently was put into effect. Essentially, Massachusetts leases intercity coaches equipped with wheelchair lifts to intercity bus operators for a period of seven years. After seven years, those buses are auctioned off, but the lease payments are set at a level which imposes the cost of the lift equipment and associated costs on the State. Now, if the costs of bus modification and maintenance can be shared on some equitable basis by Federal, State and local governments and by the intercity bus operators, we believe that one of the prime objectives of the Americans with Disabilities Act might be accomplished.

Thank you.

Senator HARKIN. Thank you very much for your testimony.

[Prepared statement of Mr. Webb appears in the appendix.]

Senator HARKIN. We now go to James Weisman, Eastern Paralyzed Veterans of America.

Mr. WEISMAN. My name is Jim Weisman, and I am an attorney for Eastern Paralyzed Veterans Association. We are the New York area affiliate of Paralyzed Veterans of America.

Unfortunately I don't have hard copy of my remarks because I haven't been back to my office since I was invited to testify, but I promise to submit them.

I really appreciate this opportunity since for the past 12 years—the last 10 in the employ of Eastern Paralyzed Veterans Association—I have advocated for access to mass transit for disabled people.

I have to point out from the onset that the agreement that the APTA representative referred to in New York City—and he emphasized the word "agreement"—was a settlement agreement. It came about after five and a half years of litigation.

Eastern Paralyzed Veterans Association prevented $500 million worth of capital improvements from being made to transit stations because the chairman of our transit authority refused to obey a State law which required them to be accessible. The entire cost of the accessibility that the chairman was refusing to obey would have been $27 million. He refused to do that.

Eventually, in order to waive accessibility at all but key stations, we had to enact a State statute, because the State statute would have required accessibility to all stations, and it was not our desire to break the back of the transit authority financially, nor was it ever our desire.

What we achieved in New York City is the following. We agreed to 65 percent bus accessibility because their attorneys told us—and it has come true—that the transit authority would actually buy 100 percent transit authority buses, but they needed a pyrrhic victory for their board members in order to approve the settlement, and we should settle for 65 percent. We are already at 80 percent. Key stations would be made accessible on the subway system. The 85 year-old subway system would have elevators put in it so that disabled people can use it. There are currently five accessible subway stations. There will be about 40. There are 465 subway stations.

While that sounds very small, the State law has only been suspended for eight years, so that any time a station is renovated after 1993, it has to become accessible, so that ultimately there will be more than 40 stations accessible. The transit authority agreed to that.

In addition to that, the panacea which was touted by the transit authority—paratransit—was also included as a component. I was afraid when we agreed to this that paratransit would start up quickly, and that there would be such a demand for it, because we have no publicly-operated paratransit today, that it would undermine the accessibility initiative, and perhaps they would rob Peter—the accessible system—to pay Paul—the paratransit system, and gather support from the disabled community to do that.

Despite the fact that it has been four years since we have settled, New York City has been unable to get a paratransit program operational. The reason why is a problem that besets other communities. Politicians have promised everyone that they will be eligible for this service. They have promised the frail elderly, people afraid to use mass transit. You know, in New York City, 3.5 million people a day use public transportation. Not one single person likes it—not one. No one gets off the subway and says, "Fabulous"—unlike a person who I hear laughing in this room, a wheelchair user who, when he took his first subway ride with me in Washington in 1977, he wanted to go back and do the trip over again because it was like the ferris wheel to him—even though he grew up in New York City, which is saturated with subway service. No one likes it. But it is vital.

Now, the question is, since it is vital in New York City, where 80 percent of the people who work use mass transit, why then, is it also so vital in rural areas where there are only five buses, in a small community?

Well, if you are thinking that you are going to do nothing, if you do not put lifts on buses, then it is not an issue; but if you are going to provide paratransit as well as put lifts on buses, this is the way it works in a rural community.

The average cost of paratransit, let's say, is $20 per roundtrip, which is a very low estimate. Therefore, it is $100 a week to take one disabled person in a rural community to work, or $5,200 per year if you are going to provide paratransit services. The lift costs $12,000; the maintenance on the lift is $400 to $700. In two or three years, you have paid for the capital improvement. The amortized cost of a lift including maintenance is $1,000 per year, $1,200 per year, for the life of that bus, capital cost and maintenance.

If you take one person off the paratransit system in the rural community, you save that bus company $5,200 per year. Now, you know that in a place where there are six buses, there is not going to be overwhelming wheelchair-using ridership. But there is going to be that person who gets out of the paratransit system and onto the bus, saving that transit operator a small fortune.

Now, the position of the disabled community has never changed on this issue. A multimodal approach has always been the argument. The position of the disabled community was articulated, in fact, in the 1979 DOT regulations.

The American Public Transit Association has changed their position over and over again, except for that it always comes back to local option. Local option used to mean no lifts on buses. Now it means if you want to put lifts on buses, you can. The APTA representative said despite cutbacks in Federal funding, we have more and more lifts on buses. I say that because of cutbacks in Federal funding, they have more lifts on buses, and if they were telling the truth, they would say that, too, because the difference between a lift on a bus and a paratransit system is so acute financially that when money becomes the issue, when money becomes the driving force, lifts go on buses regardless of the principle.

And in answer to your question before about principle, the principle is not one—transit operators aren't disgusted with disabled people. It is not that they find disabled people revolting and do not want them on the bus. It is that they want to be autonomous. That's all this is all about. They want no oversight. Public authorities exist in some States and have no oversight to run public transit, and U.S. DOT provides as little oversight as possible to play into the hands of the transit operators on this issue.

Local option is another word for States 'rights down South. It is a word that it used to veil discriminatory practices.

Now, amazingly, while there is an awful lot of similarity between the black civil rights movement and trying to use mass transit, and disabled people trying to use mass transit, the primary difference is that when blacks were trying to use mass transit, it was white people who did not want them to use it. It is not able-bodied people who do not want disabled people on transit.

When New York City first put lifts on buses, busloads of callous, indifferent, cold, hostile New Yorkers broke into spontaneous applause when they would see the lift work. People would say it is great to see the city finally doing something for somebody. And when our Mayor—and I am going to leave out all the epithets I feel like adding now—who resisted us for so long on this, when he said that it is cheaper to take everybody in a limousine than to put lifts on buses and elevators in subways, when he said that, he was reading the literature that APTA was providing on that subject, because in 1979 and 1980, when APTA was trying to exempt transportation from Section 504 of the Rehabilitation Act, and almost was successful, that's the schpeil they were selling.

Now that Federal funds are being cut back, it is impossible to maintain that position because so many of the operators are listening 1) to disabled people, finally, and 2) to their fiscal people, who are telling them that lifts on buses are cheaper.

In closing, I just want to make one point very clear. Politicians in New York—and you know, New York City local government is one party—liberal Democrats—and they opposed us. So people talk about making it a bipartisan issue—it is a bipartisan issue. When they opposed us, one of the things they would say is that disabled people will be victims of crime in public transit; disabled people are frail and vulnerable, and the humane thing to do is to provide them with door-to-door demand-responsive service.

First of all, as the Harris poll that you quoted points out, Senator, disabled people are so poor now that they live in terrible neighborhoods, and yes, they are vulnerable, and they are victims of crime every day. And the only way to break that cycle is to get as many disabled people working as possible, so that they can move to neighborhoods where crime is not a problem. And the only way to do that is to provide cheap, efficient transportation.

The other thing I want to point out is that ridership figures in New York City are not what they should be. And they reason they are not what they should be is that the transit authority hasn't told anybody about what they are doing. They have spent now tens of millions, and it is going to be hundreds of millions, on achieving an accessible end, and they are embarrassed and ashamed.

When you pick up the APTA newspaper, you don't read much about it, if anything. You read an awful lot about demand-responsive systems, the dial-a-ride types. You read very little about successful accessibility stories. U.S. DOT did not convene a conference of accessible transit operators until 1986, despite the fact that this equipment existed for ten years. So that technical things, like what kind of lubricants to use, were never shared from one operator to another.

The time has come for transit to come clean with America and say, look, we recognize, as Cambria County does, that disabled people are part of the public, we are public authorities, we are public transit operators, and we can't pick and choose the clientele.

Thank you very much.

Senator HARKIN. Thank you very much.

We'll hear next from Tim Cook, Executive Director of the National Disability Action Center, Washington, DC

Tim?

Mr. COOK. Senators, we want access, we want access to public transportation, has become the rallying cry of the disability civil rights movement in this country.

Why now? I think the reasons were outlined by Senator Kennedy earlier today. That is that access to transportation is the key to opening up education, employment, recreation—and he was correct when he said that the other provisions of the Act are meaningless unless we put together an accessible public transportation system in this country.

But why now? Why is that the theme of the movement today? I think it was partially because of actions that this Congress and in fact the bills that came out of this committee in the early Seventies in enacting Section 504 of the Rehabilitation Act and the Education of All Handicapped Children Act.

Those acts opened up education for children and young adults with disabilities in this country. The graduates of those accessible educational programs have now become adults in this country, and they want employment, they want additional training, they want to be able to participate in recreational programs with their neighbors.

But why can't the special services that the transit industry offers meet this need? First and foremost, paratransit can never allow for spontaneous transportation. You always have to make a reservation, and if your plans change, you are left without transportation.

Think of all the types of jobs requiring same-day travel or next-day travel. People with disabilities are excluded from all such occupations if they have to rely solely on paratransit.

Or, if you are in school, and a class gets rescheduled at the last minute, the transit industry says too bad for you; you can't use public transportation to get home.

Or, you are at work, and you get an invitation to go out after work to a restaurant, or to a baseball game. Forget it if you have to rely on paratransit; it can never accommodate those needs.

Paratransit is also a system that prohibits you—and this is by DOT regulation—you are prohibited from travelling with your friends, with business associates, or even with your own children or parents, unless they also happen to have disabilities.

In most of the paratransit systems in this country, they don't even have a 24-hour response time. It is more like 48 or 72 hours, or sometimes a week. They exclude people on the basis of trip purpose. It is part of the stereotype of having a disability. They will take you to the hospital if you need to go, but they won't take you to work, or they won't take you to a restaurant.

They often charge higher fares than the regular bus system. And restrictions on the hours and days of service are ubiquitous.

Mr. Burfield gave many examples in his prepared testimony. We called up the Tidewater Transportation System this morning to check on some of the statistics he gave. We chose Tidewater because it is the largest paratransit system listed in the list of cities. And we found out that the paratransit in Tidewater shuts down at 5:00 in the afternoon every weekday. I guess disabled people there never work late and never have to go anywhere in the evening.

The Tidewater paratransit system provides zero service, no service at all, on weekends. Disabled people in Tidewater have to stay home on Saturdays and Sundays if they want to use public transportation to get somewhere.

Now, the regular bus system in Tidewater runs well into the evening, and it provides weekend service for everyone else in that county.

But the most stigmatizing, diminishing aspect of paratransit is that it segregates people with disabilities.

The lawyer for the United States Department of Transportation stood up in front of the Court of Appeals in Philadelphia yesterday, in front of 12 Federal judges, and said that Section 504 did not require integration. I cannot believe that this Congress when it enacted that statute did not require that integrated service be required if feasible. And the lawyer said that integrated services are not required under Section 504 even if lifts were free. It wasn't a cost issue. And one of the most important aspects of the Americans with Disabilities Act is that it defines segregation as one of the things that is prohibited by the nondiscrimination provisions of that Act. It makes it clear if it wasn't clear already under Section 504.

There was a reference to an award that Virginia received from the President's Committee on Employment of People with Disabilities. It is interesting because the official position of the President's Committee is that paratransit service alone is inadequate; and in fact, the President's Committee feels so strongly about that principle that they pulled out their conference from San Antonio, Texas recently because they refused to make a commitment to accessible, mainline public transportation. San Antonio is one of the prettiest, loveliest cities in this country, but its public transportation system is one of the most discriminatory. And the President's Committee for that reason refused to schedule its conference in that city.

It is also interesting that the testimony provided by the trade association for the transit system comes from a member of their Task Force on Disability Service. What the testifier did not mention is that that task force has actually recommended that the transit system go a system of 100 percent lift-equipped buses. But that recommendation has not been followed by APTA itself.

It is not simply morally wrong to exclude people with disabilities from regular, main line public transportation; it makes no economic sense. If we get people off of public assistance and paying taxes, it unquestionably is going to bring down the deficit. In fact, the United States Commission on Civil Rights has estimated that it would save the national economy $800 million each year if we had a fully-accessible transportation system in this country. Clearly, the two steps up to the bus are the greatest barrier to economic opportunity for people with disabilities in this country.

And in terms of the actual costs, it is only 5 to 7 percent of the capital cost of a new bus to put a lift on. It is only one percent of the operating costs to maintain that lift. And at least for the public transportation systems in this country, 80 percent of that is covered by Federal grants.

In terms of usage, I think we need to look at systems that have a 100 percent system before we can really talk about usage figures, because people with disabilities aren't going to use a system that is partially accessible as well as they are going to use a system that is fully accessible. Obviously, if they can't change from route to route, it is a major constraint on the use of that system.

The Department of Transportation has itself said—and this appears on page 6 of my prepared testimony—that we have to put together a fully accessible system, as they have done in Johnstown, and market it before it is going to be used. And that has been the case, as the gentleman from Johnstown has indicated. In fact, if you look at Seattle's ridership figures and the preferences there, 90 percent of people with disabilities prefer to use lift-equipped buses in Seattle, Washington. That is a city that has—or at least is approaching—a 100 percent accessible system. Only 10 percent of mobility-disabled people in Seattle choose freely to use paratransit there.

I think you will find that that, as DOT itself projected, is going to be true in cities that have put together a fully accessible system.

I will simply conclude by saying we are not seeking the retrofit of a single existing bus in this country under the Americans with Disabilities Act. All we are saying is phase in accessible vehicles as new vehicles are purchased. It is going to take another 12 years, but we are willing to wait until the year 2001 for access. Otherwise, unless you at least provide for new facilities, you are going to perpetuate forever a segregated, plainly inferior system.

Thank you very much.

Senator HARKIN. Thank you very much, Tim.

[Applause.]

[Prepared statement of Mr. Cook appears in the appendix.]

Senator HARKIN. I do not know how much time we have. There may be a final vote on the FSX at 5 p.m., and I do not intend to come back after that, so let me just cover a couple of questions with you.

I heard Tim talk about cost and also Mr. Weisman. Mr. Webb, from American Bus Association, on page 1 of your testimony you state that disabled persons who use wheelchairs should have access to intercity buses, and that this objective should be achieved in a way that does not destroy a substantial part of the intercity bus system which, as you point out on page 2, services predominantly low-income riders and residents in rural areas.

On page 11 of your testimony, you state that neither bus operators nor the disabled would derive any gain from the destruction of a large part of the intercity bus industry.

I am in total agreement with you on those points. Now, let's examine the testimony which you have just presented that leads you to the conclusion that the requirement in the ADA that all new buses be accessible will lead to the financial ruin of the intercity bus industry.

In your testimony, you make the following statements: A lift costs $35,000.

Mr. WEBB. Yes, sir.

Senator HARKIN. Maintenance is $2,000 per year. Loss of space available for package express will be 38 percent. Loss of 11 or 12 seats would occur. You state that all in your written testimony.

Mr. WEBB. That is correct.

Senator HARKIN. Let me ask you, if it were possible through technological advances to develop a lift that cost under $8,000, requiring little or no maintenance, resulted in no loss of space for packages, and resulted in a loss of one seat, would such a lift meet your criteria for a policy that provided access without destroying intercity bus systems?

Mr. WEBB. It would come close, because it would still be a matter of $8,000 per bus—and I am not at all sure that the regular route operators could afford it. I believe they would feel that they are entitled to some sharing of the cost on the part of Federal and local governments, but certainly $14,000 is a lot better than $35,000.

Senator HARKIN. I said $8,000.

Mr. WEBB. Eight thousand?

Senator HARKIN. Eight thousand dollars.

Mr. WEBB. Yes. The $35,000, Mr. Chairman, is the present figure. I would anticipate that as more lifts are manufactured and installed, the cost would come down.

Senator HARKIN. But if you could get one for under $8,000, with no loss of space for packages, loss of only one seat, do you think that might be a reasonable kind of thing?

Mr. WEBB. Absolutely.

Senator HARKIN. Well, now, I am glad to hear you say that, because I have a letter here from the Regional Transportation District of Denver, Colorado. They just awarded a contract for coaches to use this new lift, and my staff just gave you a copy of the letter. I would just direct your attention down to the middle of the first page. "The Hubmatic lift eliminates totally the loss of any baggage area."

"We have estimated our loading times at some 55 seconds and our unloading times at some 45 seconds. It is capable of lifting 600 pounds to a floor height of 52 inches in a matter of seconds. It eliminated only two reclining seats in the coach itself. However, additional design changes to the interior, especially with the seating arrangement, could reduce the loss even further"—I guess, to one seat.

Now, on the second page, "We are estimating the cost for installation of this lift on a new MCI coach presently in use by Greyhound Corporation, for example, at some $5,000 to $8,000."

Mr. WEBB. I would like to provide a written response to this, Mr. Chairman, because the manufacturer of the MCI coach provided us with the $35,000 figure, and I would like that manufacturer's comment on this letter, if I might.

Senator HARKIN. I would be delighted to have your response on that, because obviously they are doing it in Denver.

He says, "The Hubmatic lift is presently built in Germany; however, Stewart and Stevenson, a local firm, is in the process of manufacturing this lift for intercity coach use."

Well, if they are getting it for 17 buses from $5,000 to $8,000, if we started ordering these for the thousands and thousands of buses around the United States, I've got to believe they would be even cheaper than that.

[Applause.]

Senator HARKIN. My staff tells me it costs Stewart and Stevenson about $4,000 or thereabouts. So we'll see. But if you could send me something, I'd appreciate it.

Mr. WEBB. Yes. I am not an engineer, but I would like to have a response to this letter from the manufacturer or manufacturers of the intercity coaches—the major manufacturers.

Senator HARKIN. On page 10 of your testimony, you state that the cost of a lift for a schoolbus used for charter purposes is $35,000. Again, you have that same $35,000 figure.

Mr. WEBB. Yes, that's correct.

Senator HARKIN. Two major wheelchair lift manufacturers were contacted to determine how much it would cost to install a wheelchair lift in a schoolbus. The Ricon Corporation, recommends that their S2000 be purchased. The estimated cost, including installation, is approximately $3,455. This wheelchair lift is hydraulically powered, and the installation includes an emergency backup system to be used in case of an electrical failure. It also has a safety override which prevents the nonskid platform from folding when loaded.

The Braun Corporation's L205 Ultra-3, used for a schoolbus—they recommend it—the estimated cost, including installation, is $2,475. For an extra $240, an emergency backup system can be installed so that in case of an electrical failure, the wheelchair lift can still be utilized. The base cost for this lift, not including installation, is $2,225.

Now, that is quite a bit less than $35,000. Would you check into those companies, too?

Mr. WEBB. I certainly will.

Senator HARKIN. Would you see if they have any different prices than what they've given me?

Mr. WEBB. Yes, sir.

Senator HARKIN. And if you would let me know, because I would like to know if you get the same answer on that. But I am glad to hear you say that if we can get it for this, then that would recognize for $8,000, loss of maybe a seat, and no loss of packages, can lift that much weight—

Mr. WEBB. Yes. That is an entirely different matter, that is true, because—

Senator HARKIN. That is new technology. Now, you are right, some of those old lifts, it is five minutes before they get up and operating. The new technological changes have made a lot of difference.

Mr. WEBB. We have only had maybe a dozen buses equipped experimentally with lifts. So it is for us an entirely new field.

Senator HARKIN. Mr. Burfield, I suppose you heard what Mr. Cook said about the Tidewater Transportation System. I happen to have a house in Fairfax County, and they have that FASTRANS service out there, but you have got to call a day in advance. I do not know about the time; maybe it doesn't operate after five, I don't know.

But on page 8 of your testimony, you state that in all rural areas and in some urban areas of Virginia, paratransit services are provided by human and social service agencies instead of the public transit agency.

On page 10, you refer to the social service agency "client"—as a "client".

In attachment 4 to your testimony, you refer to the ADC client being eligible for transportation services.

Let me ask you, who receives paratransit from the social service agencies? What are the eligibility criteria?

Mr. BURFIELD. I think I followed your question. Dr. Fletcher, I believe, at the end of her panel's presentation referred to the very confusing requirements of different Federal agencies. You have agencies on aging, agencies that handle different social or human service requirements. They come under different Federal agencies, they have different requirements.

Frequently, what happens in rural areas, where they really do not have public fixed-route transit at all for practical purposes—there is no demand for it; you don't have pockets of population or employment centers that can really be served—these services are provided by the human or social service agencies.

A good example would be in Virginia, many rural counties do not have the expertise, or cannot afford to buy the expertise, to provide some of these services. They use the metropolitan planning organizations, and they have multi-county—

Senator HARKIN. Mr. Burfield, we are not talking about a situation where there is no fixed-route at all. We are talking about a system where there is a fixed-route.

Mr. BURFIELD. I'm sorry. Okay.

Senator HARKIN. This is a civil rights statute, okay?

Mr. BURFIELD. Okay, where you have a fixed-route system but the paratransit is provided by another agency.

Senator HARKIN. Yes. You are saying it is provided by human or social service agencies. What I am trying to get at is who can use them—can anybody use them?

Mr. BURFIELD. It depends upon which agency provides it.

Senator HARKIN. Yes—human or social services. Let's say the social service agency provides paratransit.

Mr. BURFIELD. They are a client, okay, but they are not—

Senator HARKIN. Their clients are poor clients.

Mr. BURFIELD. Right, but they are not providing the paratransit system necessarily that comes under the Department of Transportation regulations.

Senator HARKIN. But you say that there are more than one paratransit systems, that social services has one and public transportation has one?

Mr. BURFIELD. In some cases, that is true. In some cases, there is no paratransit.

Senator HARKIN. No—what you said on page 8 is that "in some urban areas in Virginia, paratransit services are provided by human and social service agencies instead of the public transit agency".

Mr. BURFIELD. In the urban areas, yes, that is true.

Senator HARKIN. Well, you said in rural areas, too; you said in rural areas and in some urban areas—you say in all rural areas and in some urban areas.

Mr. BURFIELD. The distinction I was attempting to draw was in rural areas, the paratransit operated by a transit agency does not exist. In urban areas where you have a fixed-route public transit system, frequently the paratransit is provided by other agencies besides the transit system.

Senator HARKIN. That's right. So what I am trying to say is that if I were handicapped, making $89,500 per year, could I use that system?

Mr. BURFIELD. Yes.

Senator HARKIN. You had better go and check, because I'll bet you there is an income limitation on those social services—you have to be poor—

Mr. BURFIELD. Oh, I am sorry, Senator. I misunderstood. Under the transit provision, you can; there is no income limitation.

Senator HARKIN. No, no. Under the social services agencies—

Mr. BURFIELD. I believe you are correct. That is correct.

Senator HARKIN. Thank you. That's the point I'm trying to make.

Mr. BURFIELD. I am sorry. I was having trouble following you.

Senator HARKIN. The point I'm trying to make is if you have a fixed-route system, and then you have a paratransit system operated by a social services agency, they have criteria that you have to meet—not just that you are disabled, but you have to meet income criteria. So if you are disabled, you may be a secretary working downtown, making $15,000 or $20,000 a year, and they won't service you. And if your fixed-route system is not accessible, how are they going to get to work?

That's the point I am trying to make.

Mr. BURFIELD. You have a valid point, Senator. What I referred to in my original testimony, the resolution that we have gotten together with the disability advocates, this is exactly the type of thing we are trying to solve ourselves absent a mandate. We are making what we think is a genuine effort to prevent the person you talk about from dropping through the cracks.

Mr. WEISMAN. Senator.

Senator HARKIN. Yes, Mr. Weisman.

Mr. **Weisman**. Another point that we should make relative to this is that when he referred to "dumping" by social service agencies, what he is really pointing out is that these social service agencies are trying to get the most bang for their buck. And what happens is that they are in the business of providing, let's say, Medicaid, health care. And when this Congress appropriates dollars for health care, they think it is being spent on health care. But in systems that do not have accessible public transportation, the Medicaid provider, the local social services agency, has to pay a private ambulance operator $35 instead of $1 to get the person to the doctor or to the VA hospital or to vocational rehabilitation.

And all these things that look like health care and vocational rehabilitation, which is hundreds of millions of dollars nationally, is actually transit money that goes to private ambulance operators. And that is what "dumping" really is; it is saying, "Let's pay $1 like everybody else, instead of $35." That's what dumping really is.

Mr. **Burfield**. Senator, I will give you on example locally. The City of Alexandria, right here in this area, has a very, very fine paratransit system called "DOT". Under current Department of Transportation rules, dialysis patients are not classified as disabled. These are the type of people sometimes that these social service or human service agencies "dump". Now, in Alexandria, they do transport the dialysis patients, but they are not required to. This is the type of conflict that occurs.

Mr. **Weisman**. That is right. Every, single Federal agency requires recipients to take advantage of least cost alternatives. So when there is a publicly-operated paratransit system for $1 a ride, they are going to use it.

Mr. **Burfield**. No, you missed my point. If they "dump" that dialysis patient, the DOT system in Alexandria is not required to serve him; they do, but they are not required to.

Senator **Harkin**. Your point being?

Mr. **Burfield**. That when a social service agency does that, when they "dump" like that, the transit agency is faced with a very difficult problem. They are not required to serve that patient under the rules—now, they do in Alexandria voluntarily. This is, I think, a lot larger problem than a lot of people really appreciate, that the various requirements of a lot of the agencies that the Federal Government funds, I think, need to be meshed or consolidated a lot better; and that it would be a lot cheaper and make a lot more sense at the local level, where everybody that needs a paratransit or fixed-route transit service could receive it. But that is certainly not the case today.

Senator **Harkin**. Well, the thing is—and I don't know if I follow all that—the thing is that with a paratransit system, let's face it, there are still homebound people, and there are still people who are institutionalized who are going to need that kind of paratransit system to get to a doctor, to get someplace periodically. These are individuals who would not be capable of joining the work force. They are homebound, they are institutionalized, they are severely disabled, and they are going to need paratransit, and you are going to provide it; we are going to provide that kind of service. That is not what we are talking about here. We are talking about a civil rights bill to provide access to the public. That's all we're talking about.

On page 12 of your testimony, you state that "the disabled overwhelmingly preferred paratransit service"—that is what I referred to earlier on today, and you heard the reaction of some in the audience.

Mr. **Burfield**. Yes, sir.

Senator **Harkin**. Well, why do you believe groups such as the Easter Seal Society and Paralyzed Veterans of America reacted so negatively to APTA's reaffirmation of the local option policy and refused to adopt the task force recommendation that all new buses have lifts—in other words, APTA refused to accept the task force's recommendation that new buses have lifts.

Here is the Easter Seal—"the national society was shocked, however, to learn that the APTA board then acted to re-establish its commitment to the 'local option 'policy. This policy is widely regarded as an impediment to nationwide implementation of truly accessible, integrated, multimodal transportation services and as such was rejected by disability advocates many years ago." That is the National Easter Seal Society.

Mr. **Burfield**. Senator, I cannot speak for the National Easter Seal Society. As my testimony indicates in a little bit more detail, I cited the most recent numbers from the Richmond area and from Northern Virginia, and where both services are available, the ratio is 59-to-1 paratransit to fixed-route in Richmond, 37-to-1 in Northern Virginia. The gentleman from—

Senator **Harkin**. So you took a survey on Richmond.

Mr. **Burfield**. No, no. These were numbers from the Greater Richmond Transit Company, their own real numbers.

Senator **Harkin**. So the transit company had numbers, and they said that they polled some people.

Mr. **Burfield**. No, no. They count—they know the number of people who rode fixed-route and the number of people who rode the paratransit system.

Senator **Harkin**. So 59 rode the paratransit to every one that rode fixed-route.

Mr. **Burfield**. Correct.

Senator **Harkin**. Any comments on that?

Mr. **Cook**. Yes, Senator Harkin, a couple. First of all, none of those cities as far as I know have anything approaching a 100 percent lift-equipped system, and as I pointed out, people are less likely to use it if they can't switch from route to route.

Senator **Harkin**. Let me ask Mr. Burfield—is it 100 percent accessible in Richmond?

Mr. **Burfield**. No. Richmond is a little bit over 50 percent currently.

Senator **Harkin**. So if I am disabled, and I want to get on a bus, maybe one bus will take me someplace, but if I've got to transfer, and I can't get on the other bus, why would I ride it?

Mr. **Burfield**. That may very well be true, Senator. I am merely citing the additional comment.

[Applause.]

Senator **Harkin**. Look, we've got to cut through this nonsense, I'm telling you. Now, there has not been a bigger supporter in this

Congress of the American Public Transportation Association than I have been. You check my record. I am on the Transportation Appropriation Subcommittee, and I have fought tooth and nail for public transportation in this country. But to sit here and listen to this kind of stuff, to say that they said 59-to-1, and then to find out, wait a minute, it is not even 100 percent accessible—Mr. Burfield, please go back to the people you represent and ask them to be a little bit more sensitive than that. They have to recognize the fallacy of that argument.

You cannot have a system that is 50 percent accessible and say, well, people won't ride it—they will take paratransit. Of course they will take paratransit. At least they can get from Point A to Point B with the paratransit. But don't give me that nonsense.

Mr. COOK. If I may, Senator Harkin, there is a second problem with those sorts of surveys, and that is when you count the number of people who use lift-equipped buses, what they are counting is the number of times that that lift is used. When they count paratransit, they are counting the number of total riders—so they are counting blind people, deaf people, semi-ambulatory people who wouldn't be counted if they had boarded the bus. And the Government figures show that this distorts the figures by fivefold, because only 20 percent of the paratransit are the ones who actually use the lift-equipped buses.

Senator HARKIN. Now how about that, Mr. Burfield?

Mr. BURFIELD. I have no reason to doubt that, but I would say the rest of the—he cited the whole disabled population, which we are required to serve under both the current regulations and under your bill. All of them can use either system regardless of whether they are physically disabled or not.

Mr. COOK. But the point is when you count the number of people who use the bus, you only count the number of times the lift is used, and that just distorts your survey figures.

Senator HARKIN. And does the paratransit in the Greater Richmond Area operate just like the bus system—I mean, all hours of the day, every hour, weekends, and all that kind of stuff?

Mr. BURFIELD. It is called the Star System, and it does operate on the weekends, yes, I know.

Senator HARKIN. And exactly like the bus system, the same hours?

Mr. BURFIELD. I am not certain.

Senator HARKIN. If I were handicapped, could I take my brother with me on it or some out-of-town guests on it; could I do that?

Mr. BURFIELD. I can't answer that. I don't know.

Senator HARKIN. Well, I'd like to know, because I doubt if that is so. What if I just wanted to go out to eat; would they pick me up and take me out to a restaurant and come pick me up afterwards? I really doubt it, I really doubt it.

Mr. WEISMAN. Senator, you know, Government is not acting irresponsibly when they do not, though. You see, that is the terrible position transit finds itself in when they refuse to put lifts on buses. They have to dole out a service that is in high demand, and people have different reasons for travelling. In fact, disabled people have the exact same reasons for travelling as able-bodied people. So that a trip to the doctor seems more important to responsible Government providers of services than a trip to a movie. And they say, "I am sorry, you can't go."

And you say, "Gee, I can't go—then why should I go to work and earn a living, because I can't spend it?"

It is a disincentive to—it not only forces desegregation, but it is a disincentive to employment, because physically disabled people can in this day and age relax and collect benefits—they live terribly, but they can. And unless you are going to give people a reason to work, that is, that you can spend your money and enjoy the amenities in society like everybody else can, they don't. And that is what happens when they maintain these inaccessible systems.

Senator HARKIN. Mr. Louwerse, it appears clear to me that transit authorities around the country are beginning to accept the importance of making fixed-route buses accessible. As a member of APTA's Elderly and Disabled Persons Task Force, the 1988 President's Task Force that proposed this general statement—"The policy of APTA will be to promote total accessibility and mobility for all elderly persons and individuals with disabilities; 2) APTA urges the Federal Government to establish a national policy that all purchases of new buses, railcars and related equipment be accessible to individuals with disabilities." Those are just the first two of eight points in the—

Mr. LOUWERSE. I am well aware of that, and I supported it.

Senator HARKIN. And you supported that; I know you did, and that is why I wanted to say that. On page 9 of your testimony, you describe Cleveland's paratransit system. But on April 18th of this year, just last month, the Board of Trustees of the Greater Cleveland Regional Transit Authority adopted a resolution specifying that in the future, all new buses will be purchased with wheelchair lifts. They just did that last month.

I have here a resolution from the Southern California Rapid Transit District—I am not certain what that covers—

Mr. WEISMAN. That's L.A.

Senator HARKIN. That is L.A.—they adopted this: "Resolved that the Board of Directors of the Southern California Rapid Transit District hereby goes on record in support of S.933, the Americans with Disabilities Act." So they just adopted that.

Mr. LOUWERSE. If I may comment.

Senator HARKIN. Sure.

Mr. LOUWERSE. I would take exception with Mr. Weisman's remark—he is from New York, but I come from a lot of small town, and there are a lot of people in transit who are working diligently and concertedly and with care. You can come to my town any time you want. We have struggled for a long time. In the early Seventies, we put together a coordinated transportation system to do away with this social service agency and that social service agency. We have a unified fare; everybody gets charged the same thing; unless you are handicapped or disabled or qualify under the Medicare program, you ride half-fare. That half-fare is the fixed-route half-fare, not just the standard fare for the paratransit.

Also, the public may ride the paratransit in our community. There is no distinction. If you are a public person, and you want to ride that paratransit vehicle, you have the same right as a person who is handicapped.

On our own, not because we want to displace—

Senator HARKIN. Did you say anyone can ride paratransit?

Mr. LOUWERSE. Yes. It is public service.

Senator HARKIN. Regardless of income?

Mr. LOUWERSE. That's right. It is public service.

Senator HARKIN. Does it operate the same hours as the buses?

Mr. LOUWERSE. It does operate in the evening, but it does operate the rest of the time. Basically, we have only one route that operates in our fixed-route system in the evening anyway, so it is of no consequence.

Senator HARKIN. How big a city is this?

Mr. LOUWERSE. It is 172,000 urbanized area, Reading, Pennsylvania.

Senator HARKIN. So the paratransit operates for non-handicapped people, too?

Mr. LOUWERSE. That's correct.

Senator HARKIN. Anybody can use it.

Mr. LOUWERSE. Yes. You are a public person, and you have the right to ride. We have standing reservations for people who have work trips.

Senator HARKIN. So it is a demand-responsive system.

Mr. LOUWERSE. The point I am trying to make is—I'll give you an example. Two years ago, we worked with our social service agencies and took 300 individuals who used paratransit to try to train them to ride the fixed-route. I received more political heat than I ever wanted to receive in my life, because they said, "Oh, you're not taking away our specialized transportation."

Senator HARKIN. Well, we aren't in our bill. Wait a minute—

Mr. LOUWERSE. I know, I know, but I'd just like to make a point if I may.

Senator HARKIN. Okay.

Mr. LOUWERSE. When we worked to decide to get fixed-route buses that are lift-equipped, we worked with our people; there were stories in the paper—but people only read the headline: "BERT to Get Lift-Equipped Vehicles"—I was inundated with phone calls. Or they would see me in the grocery store and say, "Hey, Dennis, what are you doing? You can't take away our specialized transportation."

I'd say, "No, I'm not," because our specialized transportation is growing 25 percent a year. I suspect someday it may be bigger than our fixed-route system, which has 54 vehicles.

But there are a lot of people in this country who are dedicated to doing the best for full accessibility. I cannot sit here and tell you that I know all the answers for L.A., Denver, Johnstown. I am lucky if I know all the answers for Reading. I am trying to get all the answers. And my point to you is we have to give serious consideration when we say, well, maybe it makes sense in Denver to have fixed-route. I can show you a place in Pennsylvania, Warren, Pennsylvania, where they've got four vehicles in their transit system. I think one of them is the executive director's car. I can show you a five-county area where the population per square mile is like three, where my brother lives. Now, to tell them to buy a fixed-route bus and put a lift on it is ludicrous.

Senator HARKIN. Mr. Louwerse, who is asking you to do that? Who is asking you to do that?

Mr. LOUWERSE. Your bill says we will put lifts on all new bus purchases.

Senator HARKIN. Mr. Louwerse, you haven't read the bill.

Mr. LOUWERSE. Yes, I have. Maybe I misunderstand it.

Senator HARKIN. Okay. Would you read Section 303, Subparagraph (d), "Community operated demand-responsive systems for the general public. If an individual or entity operates a demand-responsive system"—which you just described—

Mr. LOUWERSE. That's right.

Senator HARKIN. "That is used to provide public transportation for the general public"

Mr. LOUWERSE. That's correct.

Senator HARKIN. Then it says—and I am not going to read the whole thing—but it says that basically, all new buses have to have lifts unless the entity can demonstrate that such system when viewed in its entirety provides a level of service to individuals with disabilities equivalent to that provided to the general public. There you go. You are home-free.

Mr. LOUWERSE. My point is—I understand what your bill is saying, but—

Senator HARKIN. Reading, Pennsylvania is home-free.

Mr. LOUWERSE. Well, I am worried about Reading, Pennsylvania. That's the point. But—

Senator HARKIN. I am saying that we don't demand that you do that. I said the bill does not require—

Mr. LOUWERSE. I understand that. But the point is I think we need to look at our track record in this country for Federal mandates. I think what you need to mandate in my judgment, if it isn't already mandated, is that all persons in this country have the same right to full accessibility, and we maybe need to mandate a process to ensure that that is carried out. I know there are some comments about people do not work with their community. Fortunately, we have a good relationship in our community with the handicapped people. I think that is what we need to emphasize and then say to that local community, "You have to work with your people to develop this program."

The other thing is, if you are going to give me a Federal mandate, I think you had better look long and hard at the cost—let's be realistic. I understand everybody's right to want to ride. But the overriding question also has to do with cost. We have been taking a 50 percent hit over the last number of years. I am running buses that are 14 years old. Federal law says a bus is worth 12 years. Okay, in 12 years, I could get a new one—I don't have any money to get new ones—

Senator HARKIN. Mr. Louwerse, let me just tell you, if you are going to buy buses anyway—I figured this out today, and I don't have the figures in front of me—but for this $8,000 lift that we were talking about, amortize that over 12 years, it came down to 100-some dollars a year, or $150 per year.

Mr. LOUWERSE. I personally have no problem with that, but I just recently bought buses, and the lifts cost me about $13,000 apiece.

Senator HARKIN. So at least it still wasn't $35,000. You had better look into this new lift here; you may want to get the name of this new company.

Mr. LOUWERSE. They are brand new. I am committed to providing full accessibility for the citizens of Berks County however it takes me to do it. I'd like to have your help, and you have supported public transit in the past.

Senator HARKIN. I intend to continue that, too.

Mr. LOUWERSE. And I think we need to look at—again, I suggest that there are a lot of unique differences that we have to look at.

Senator HARKIN. Well, there are differences, and I am sensitive. I come from a small town; both Dave and I represent States that are heavily rural. But here is Harold Jenkins—how big is Johnstown?

Mr. JENKINS. Thirty-two thousand population.

Senator HARKIN. Thirty-two thousand. Look at what they have done.

Mr. LOUWERSE. I have been there many times, sir. I even was in the hospital there. So I know all about it.

Senator HARKIN. Look what they have done. They have shown the way. And what we are trying to do is exercise some leadership here. I mean, people out there want to do things that are correct; they don't know exactly how to do it.

Mr. LOUWERSE. There are a lot of people who are doing things correctly already, sir, I would suggest to you—not only Johnstown; many places are doing things correctly.

Senator HARKIN. But keep in mind—and I have utilized all my time, and I apologize to Senator Durenberger—just keep in mind that what we are doing with this bill is a civil rights bill. We have tried to put enough flexibility in this bill to allow communities to adopt and adapt and do different things. But it comes down to essentially this point, that for those disabled Americans who want to work, who want to become involved in the mainstream of American life and who are able to do so but are prohibited from doing so because of artificial barriers that have been erected, we are saying we are going to reduce those barriers. We are going to make it fully accessible—communications, transportation, and a whole host of other things—to make sure that we break down this last vestige of discrimination.

Will it cost something? It may, but it is going to cost a lot less in the long run. You know that as well as I do. When these people work and pay their taxes and become fully integrated in society, we are all going to be better off for it.

And quite frankly, if I have heard it once, I have heard it a thousand times, from people I associate with who have been disabled for many years—they don't like the feeling of dependency. They want to be independent. I asked one person, "What do you mean, you want to go out there in the rain and get on a bus? You can get a paratransit that comes right to your door, they'll put the umbrella over you, take you out and put you on the transit and take you where you want to go."

He said, "I don't want that to happen. I want to sit out in the rain just like the other people who have got to deal with the bus. I want to be treated like everyone else. If they can stand at the bus stop in the rain, I can sit in my chair in the rain, too, as long as I can get on the bus."

[Applause.]

Senator **Harkin**. So I think there is that sensitivity that we have to be aware of that t hey want that kind of ability and we have to extend that civil right to them.

Senator Durenberger?

Senator **Durenberger**. Senator, I could butt in here, I suppose, as well as anybody else, but I really have enjoyed the way in which you have gone about both analyzing the problem and simplifying the opportunity. I have enjoyed that a lot.

When I took off, I had to do my weekly news show, and one of the questions came from Northfield, Minnesota. I have two radio news editors, and they just call in cold questions. One question was: "What do you know about this Federal regulation to get lead out of all the plumbing systems, the copper systems and so forth?"

I said, "Oh, I know all about that. It is Senator Bradley's bill, but it was on my Safe Drinking Water Act that we accomplished it. It is a terrific piece of legislation."

And the woman on the other end said, "Then, why didn't you send some money to implement it?

We have got to implement this back here in Northfield, Minnesota."

And I said yes, it reminds me of asbestos in the schools and a lot of other things. I just don't think that you and Mr. Louwerse have much disagreement at all. All I hear him say is that if you put enough money in for the mandates, or preferably, let us figure out how to do this, tell us what you want to accomplish, and then give us the resources to do it, give us an opportunity to do it better in our community than they might do it in some other community—we'd all be better off.

But the key to that is really the resource issue, and that's why I asked the other question. I sit on the Public Works Committee, authorizing all this money. Senator Harkin sits on the Appropriations Committee, spending it. I sit on the Senate Finance Committee, establishing tax policy, giving the tax credits to intercity buses. So I come at this from a variety of ways.

And I have had the disappointing experience of constantly mandating that somebody do something but not sending the resources down to do it.

So I authored, legislation along with Pete Wilson, that says "You can't have a Federal mandate unless you pay for it." And I think so far, we've got three cosponsors. A lot of folks do not want to sign up for something like that because they think it will discourage mandating.

And yet when you come into a situation like this where we continue to mandate without sending the resources to carry it out. We went through this several years ago with the Voting Rights for the Handicapped Act—we are going to make all the voting places in America accessible to persons with disabilities. But we didn't send along a check or the resources to carry it out. It was sort of an encouragement that we sent along. And I figure there are still a lot of folks in this room who are probably having some difficulty gaining access to polling places.

So the question that you have been asking here, Tom, I think, and the questions that concern me probably are not appropriate for this—I should not say they are not appropriate—they are very appropriate for this hearing, but they are not going to get acted on unless the two of us, with our other hats on, and some of the rest of the folks around this table actually do something about letting communities out there who want to handle this problem in a way that is unique to their communities go ahead and do it, and then find some way to make sure the resources are there to accomplish it. I don't know that there is any easy way to figure out what that is. But I really am bothered by the fact that in many communities in Minnesota, we will spend tens of millions of dollars building a freeway out to Wayzata, MN, so everybody can rush in and out with their cars, but we won't put a bus lane in so that people who don't have cars can use it. But it is tens of millions of dollars so all these folks can go back and forth at 55 miles an hour. But we won't spend the kind of money—whether it is $13,000 or $8,000 or $4,000 or $35,000 or whatever it is—to make the rest of this mass transit system available to people. We complain about these relatively small amounts of dollars.

I can only assume that we complain about it because we do not have the resources, not because we are insensitive. No matter which level of government is or whose bus company, we thought the resources were there, we thought the money was there.

But I heard from one of the witnesses, Mark, I guess it was, that there is more to this than money. And some of it, maybe we have learned from these witnesses in terms of attitude—some of your testimony said if you start out with a positive attitude, and you decide you want to accomplish the job, then you can find a way to accomplish the job.

Mr. JOHNSON. And APTA is not starting with a positive.

Senator DURENBERGER. Yes, amen.

[Applause.]

Senator DURENBERGER. Anyway, rather than take the time now, I think there probably are some further questions I will have in writing.

Senator HARKIN. Thanks, Dave.

I will say one thing somewhat in defense of APTA. APTA represents hundreds, thousands—how many local jurisdictions does APTA represent—thousands of local transit companies around the United States. Again, they are not, I think, as sensitive as those of us in this room are to this issue, and a lot of times, of course, they want to maintain their local option. They want to have control. It is like local schools or anything else. They want to have control over their system. So they feed that input into APTA and say, "We want this local option," and APTA is representing that viewpoint.

So I understand that. Again, I am hopeful that APTA would again look at this legislation very closely and see all of the various things that have been done to accommodate different approaches. For crying out loud, we even put in there that small communities, if they buy used buses, they don't even have to buy a bus with a lift. And in a lot of small communities in our State, they buy those used buses, fix them up a little bit, and use them. They don't have to have a lift. We made all those kinds of accommodations. Coming from a rural area and small communities, I was interested in that.

I guess the only thing that dismays me a little bit is seeing these figures thrown out about how much a lift may cost and taking up all this, when we have new information now that doesn't support that, that says it is much cheaper, and we can put them in, and they are quicker, that there are new technologies, and we don't have those kinds of problems.

The last thing I would say about public transportation is that I am on the Transportation Appropriation Subcommittee—how much have we got now, Dennis, in the Trust Fund—is it $4 billion in that Trust Fund now?

Mr. LOUWERSE. I do not know, but I know they are not releasing all the funds that have been collected in the Trust Fund, and that is one of their problems.

Senator HARKIN. I think it is about $4 billion or so.

Mr. WEISMAN. I think it is $4.3 billion.

Senator HARKIN. That sticks in my mind—$4.3 billion, which we are not spending, and obviously it is being used to make the deficit not look so big. Well, it is my intention that at the first opportunity and every opportunity after that, I think we ought to take right off the top of that some money—I don't exactly say how much, and I look to APTA to give me the information on how much that you might be able to help us take off to help some of those communities out there that are going to buy these lifts and that are going to be buying new buses. And I have got to believe that out of $4.3 billion, if we couldn't find a few million dollars to provide some help and some support for communities, based upon certain criteria, that would enable them to go ahead and meet this—so again, answering your question about trying to get the money out there, I can't say we are going to be successful, but I call upon APTA, rather than fighting this bill—which is going to go through anyway—

Mr. LOUWERSE. I don't know that we said we were fighting it. I will say, if I may, that the Board of Directors has not taken a formal position. We are now in the process where our memberships have been asked to evaluate this bill so that we will be able to generate a position in the very near future.

Senator HARKIN. Okay. And the bus companies, too, Mr. Burfield—come to us and help us get some money out of the Trust Fund to help communities meet this need. And by gosh, I'll tell you I'll be in the front rows helping you. And I think you will have support here. You will have the support of the disabled community; I think you will have the support of a lot of people here who serve on the Appropriations Committee to make sure that if this bill passes, that they will be willing to do something about getting some of that money out of the Trust Fund for these purposes.

Mr. WEBB. I want to point out, Mr. Chairman, that we are not a recipient of any Federal financial assistance, so we do have a special problem. I mean, we are willing to provide maximum accessibility to the extent that we can afford it.

Senator DURENBERGER. Maybe giving some of us some ideas.

Senator HARKIN. Well, hopefully, he'll look at these new lifts that only cost $8,000 and start using those.

Mr. **Jenkins**. Senator, if I might just very briefly give you a point that was sticking in Cambria County Transit Authority's mind back in 1980. Nobody ever came to us and said you'd better have a wheelchair lift on your bus. We never had one request for a wheelchair lift until they were installed, and then they have been used ever since. We viewed that as the same thing as we never had air conditioning in our buses prior to 1980. So the cost of doing business and the cost of keeping the air conditioning units functioning properly is the same way we look at keeping the wheelchair lifts functioning properly. And if I had my druthers, I'd rather get rid of the air conditioning, because I get more grief over them than I do the lifts.

[Applause.]

Senator **Harkin**. I want to commend you and the community of Johnstown for taking that kind of leadership position. And again, I would hope that when the bill passes, APTA will take your example—in fact, what you do up front, the up front things you have to do before you just start putting the lifts on the buses—to get people aware of it.

Mr. **Jenkins**. I am an active member of APTA, and I think APTA will certainly get the message that you have delivered to them today, and I assure you that you can look for support from them.

Senator **Harkin**. Thank you all. You have all been good witnesses. I don't mean to be so hard on some of you because you are my friends, and I have been supporting you for a long time. And again, I want you to focus on helping us try to get some appropriations out for this.

Charles Webb, I did not mean to come down too hard on you, either, but look at some of these—and maybe it is just old data—but look at some of these new figures and some of these new lifts, you know.

Mr. **Webb**. I certainly will, Senator, because this is the first I had ever heard of this particular lift.

Senator **Harkin**. Well, I appreciate that. Technology changes every day.

And Mr. Burfield, take a look at some of those transit systems out there, too.

Well, we have got to close, I am going to ask unanimous consent to insert a statement by the Honorable Richard Celeste, Governor of the State of Ohio, and also a letter from Sandra Parrino, who is Chair of the National Council on the Handicapped, dated May 16th. I will not read it, but basically it is reiterating the Council's strong support for the passage of this legislation.

[Statements of Governor Celeste and Ms. Perino follow:]

Senator **Harkin**. Senator Durenberger, did you have anything further before we close?

Senator **Durenberger**. No, Mr. Chairman. Thank you.

Senator **Harkin**. Thank you all very much. I appreciate your being here today.

[Material supplied for the record appears in the appendix.]

The subcommittee will stand adjourned until the week of June 19th.

Thank you.

[Whereupon, at 5:30 p.m., the subcommittee was adjourned.]

AMERICANS WITH DISABILITIES ACT

THURSDAY, JUNE 22, 1989

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC

The committee met, pursuant to notice, at 9:37 a.m., in room SD-G50, Dirksen Senate Office Building, Hon. Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Metzenbaum, Simon, Harkin, Hatch, Coats, and Durenberger.

The Chairman. We will come to order.

Today, this committee is holding the fourth and final hearing on the Americans with Disabilities Act. We are pleased to welcome two distinguished witnesses this morning: Attorney General Dick Thornburgh, who will present the views of the Administration on the bill; and former Senator Lowell Weicker, a tireless champion for people with disabilities and the original sponsor of the Americans with Disabilities Act.

The Americans with Disabilities Act is comprehensive legislation to eliminate barriers that prevent disabled individuals in our society from fully participating in all aspects of American life, and to prohibit segregation and discrimination against people with disabilities. Simple justice, embodied in this bill, is too long overdue for the 43 million disabled Americans whose lives are limited not by their impairments but by prejudice, fear, and misinformation on the part of non-disabled persons.

I know that President Bush shares my commitment to integrating disabled Americans into the mainstream of our society. On January 18, 1989, President-elect George Bush pledged action on the Americans with Disabilities Act in order, in simple fairness, to provide the disabled with the same rights afforded other minorities.

The ADA is carefully crafted to give disabled persons the same protections from discriminations that apply to racial minorities, no more, no less. It protects the same people that are currently protected by Section 504 of the Rehabilitation Act of 1973 from discrimination by recipients of Federal aid. In the area of employment, the ADA parallels the scope of Title VII of the Civil Rights Act and provides the same remedies that are available to minorities who suffer employment discrimination. The ADA incorporates the principles in Section 504 of the Rehabilitation Act of 1973 that otherwise qualified disabled workers are entitled to reasonable accommodations unless such accommodations would be an undue hardship on the employer.

Undue hardship is a flexible concept which takes into account the size of the business and assures the ADA will not adversely affect small businesses. In 1986, this Nation spent $169 billion to keep disabled persons dependent, yet 66 percent of working age disabled persons say they would like to work. We cannot afford to deny job opportunities to these people.

In the area of public accommodations, the ADA extends to the disabled the protections given to minorities by Section 1981 and Title II of the 1964 Civil Rights Act. Public accommodations provisions are critical to mainstreaming disabled persons. They guarantee access to doctors 'offices, to supermarkets, to drycleaners, to shopping malls, as well as to movie theaters and restaurants. People with disabilities cannot fully participate in our society if they cannot bùy groceries and take their children to the dentist. The principle in the ADA is simple: If an establishment is open to the public, it should welcome the disabled as members of the public.

With the exception of transportation in the area of public services, the ADA simply extends the protections of Section 504 to those governmental entities that are not covered by Section 504. Our experience under Section 504 demonstrates that its requirements have not been burdensome. Accessible transportation is the lynchpin for the integration of the disabled. It does little good to open the doors of institutions to provide rehabilitation and early intervention programs if the disabled cannot even leave their homes to move freely in society.

The ADA focuses on the future and adheres to the basic principles of non-discrimination and integration in public and private transportation services. It is not equality to make local public transportation accessible so that disabled individuals can get to work but deny them the recreation and travel opportunities offered by private interstate transportation.

In the area of telephone communications, the ADA requires that special operators be available to assist the hearing impaired. In the area of remedies, the ADA provides enforcement schemes tailored to the kinds of discriminations prohibited and comparable to the remedies available to minorities for civil rights violations. Twenty years after the Fair Housing Act was passed in 1968 we learned the hard lesson that a right without a remedy is a hollow promise.

Finally, last year, Congress put teeth in the enforcement provisions of the Fair Housing Act and prohibited discrimination against the disabled in housing. We have incorporated some of the consensus enforcement provisions of the new Fair Housing Act into the ADA. I am taking the time this morning to highlight the key principles of the ADA because it consists of a very carefully crafted set of provisions that are necessary to give disabled Americans protection from discrimination that is comparable to other minorities and to allow them to become full participants in our society. I look forward to working with the administration to enact the Americans with Disabilities Act.

Senator HATCH.

Senator HATCH. Thank you, Mr. Chairman. I welcome our Attorney General here today with us. Welcome, Attorney General Thornburgh. We are glad to have you.

The subject before us, meaningful and reasonable comprehensive civil rights legislation for everyone with disabilities, is of vital interest to me, I think to the rest of the committee, and, of course, to millions of Americans. I support such legislation. It is a necessary addition to our body of national civil rights laws, and I want very much to see a bipartisan bill with administration support pass the 101st Congress.

As you know, Mr. Chairman, I have serious reservations about S. 933 and cannot support it in its present form. Nevertheless, I have refrained thus far from introducing my own legislation, a draft of which I circulated some time ago. I have spoken with Senator Harkin on several occasions to reach compromises, and our respective staffs have met.

Last week, we circulated to Senator Harkin's staff, the chairman's staff, the administration and others a marked-up copy of much of S. 933, and we are still working on some parts of it. What we circulated is a serious and sincere effort to reach common ground. I hope that various interested parties are seriously reviewing it. I would like to see the administration sit down with me and, of course, the principal sponsors and other members of this committee to work this out.

We need the administration's input for a meaningful and reasonable bill. It is time for a serious response to concerns I have been mentioning for 6 months. The scope of the public accommodations section should be parallel to that of Title II of the Civil Rights Act of 1964, the public accommodations title of that landmark act—the very same scope provided for in last year's version of the Americans with Disabilities Act.

The employment remedies of the bill should be parallel to that of Title VII of the Civil Rights Act of 1964. The remedies in the public accommodations area should parallel those under Title II of the Civil Rights Act of 1964, and those remedies should be used in the remainder of the bill. The standards of the bill should be conformed to those under Section 504 of the Rehabilitation Act of 1973. Otherwise covered entities with less than 25 employees should be exempt, and a variety of other concerns that are addressed in the document we circulated last week should be met.

It remains my hope that we can resolve these concerns. If we cannot do so, I will have to reconsider whether or not to introduce my own legislation. I would prefer to work out my concerns before a markup, and certainly before this bill reaches the floor. If we are unable to do so, I will have no choice but to take the time to go through each of the unresolved issues.

As I mentioned last month at a hearing on S. 933, I do not intend to engage in dilatory tactics in the committee. I also said, however, that I intend to have any unresolved issues fairly and expeditiously heard in committee. It would be useful to clear a way as many of those issues as we can ahead of time.

Now, I want to compliment the distinguished chairman of this committee and the distinguished chairman of the subcommittee, as well as the ranking member on that committee, for the work that they have done thus far in trying to accommodate those who are interested in change. I think we need to do more work. I think we need to get together a little bit better. But there is a lot of work which has gone into this bill, and those who have done so much on it deserve great commendation and credit. But I think we can get a bill here that virtually everybody can support, and that is the way to solve these problems. And I think it will be a bill that will be very broad in the protection and promulgation of the rights of all persons with disabilities in our society.

I would like that. I want to participate in it. I would like to be able to help in it, and I am dedicated to getting that done.

Mr. Attorney General, as I view your statement, you go a long way towards explaining some of these issues for the administration, and we appreciate the efforts that you have put forth.

The Chairman. Thank you very much, Senator Hatch.

I would call on Senator Harkin and then the ranking minority member, and then I would like to turn to the General. He has got a limited period of time.

I call on Senator Harkin, who is the principal sponsor of the legislation.

Senator Harkin. Mr. Chairman, thank you very much.

I again want to thank you for your leadership in this area for making sure that the committee handles this bill in a very expeditious but very thorough manner. Your leadership on this issue, as in so many other areas, has really been an inspiration for all of us. Again, I want to thank you for making sure that we do get this bill through this year.

I also want to thank my ranking minority member, Senator Durenberger, who has worked very closely with us on this legislation, and also Senator Hatch with whom we have been talking since last December. We have had a good relationship. We have been working constructively on the bill. We have made changes. We have made accommodations. And I hope that in that spirit of trying to get a good bipartisan bill I am sure that we can work it out and that we will get a good, strong bipartisan bill through the Congress and one that the President will sign.

The Americans with Disabilities Act is the most important legislation affecting the lives of people with disabilities ever considered by Congress. We now have 43 co-sponsors of this historic legislation from both sides of the aisle. The ADA has now been endorsed by over 140 national organizations, including most of the major religious organizations.

After 3 days of hearings this year and one hearing last year, several conclusions have emerged.

First, discrimination against people with disabilities remains pervasive in our society.

Second, people with disabilities are entitled to lead independent and productive lives, to make choices for themselves, and be integrated and mainstreamed into society. These are inalienable civil rights.

Third, people with disabilities are entitled to meaningful access to all aspects of American society, which includes access not limited to places of employment, restaurants, and hotels, but also includes, among other establishments, doctors 'offices, cleaners, shopping malls and the like.

Fourth, in order to ensure independence, productivity, and integration into the community for people with disabilities, it is necessary to adopt comprehensive civil rights legislation. I say comprehensive because, for example, transportation is the linchpin that ensures access to jobs, access to a social life, the ability to even go to a restaurant or to participate in community activities.

Fifth, it is not economically feasible to remove all architectural, communication, and transportation barriers in existing facilities—we know that—but we must work to improve access in such existing facilities. However, we can and we must insist on full accessibility in all new facilities.

Sixth, a right without a meaningful remedy is like a bell without a clapper; it is hollow and empty.

Seventh, the Americans with Disabilities Act balances the rights of people with disabilities with the legitimate concerns of the business community. The ADA does not create undue burdens on small business.

Eighth, the Americans with Disabilities Act is not only the right thing to do for people with disabilities, but it is also the right way to help strengthen our economy and enhance our international competitiveness. The ADA will save the Government and society billions of dollars by getting people off the dependency of social welfare, and into jobs, into restaurants, into shopping centers, and into community activities.

Two days before Mr. Bush's inauguration, he said, and I quote: "I said during the campaign that disabled people had been excluded for far too long from the mainstream of American life...One step that I have discussed will be action on the Americans with Disabilities Act in order, in simple fairness, to provide the disabled with the same rights afforded others, afforded other minorities."

I look forward to hearing the testimony of the Attorney General on behalf of President Bush and also the testimony of my friend and former colleague, Lowell Weicker, who was the chief sponsor of the ADA bill in 1988 and one of the individuals perhaps more responsible than anybody else in this body for making sure we are at the point we are at yet today.

[The prepared statement of Senator Harkin appears in the appendix.]

Senator HARKIN. Mr. Chairman, if you might indulge me, I would like to recognize two individuals in the audience who, by their work and their example, really tells us why we are here today. Both of them have testified before this committee in the past, and both of them have been exemplary public servants.

First of all, James Brady, former press secretary to President Reagan. We appreciate all that you have done and the example that you have shown in terms of overcoming disabilities and showing what people really can do, getting us to look at people with their abilities and seeing disabled people for what they can do and not what they cannot do.

Senator SIMON. You should have mentioned, Senator Harkin, he is from southern Illinois originally, too.

Senator HARKIN. That explains it all, then.

Senator SIMON. Yes.

Senator HARKIN. Secondly, I want to recognize another good friend: Justin Dart, former commissioner of the Rehabilitation Services Administration under President Reagan. Again, another spark plug behind this legislation and one who has I think traveled to every State in this Nation to push for the implementation of the Americans with Disabilities Act. As just one American as someone with an intense interest in this, I appreciate both of you and what both of you have done.

Thank you, Mr. Chairman.

The Chairman. Senator Durenberger?

Senator DURENBERGER. Mr. Chairman, I have a statement that I would like to be made part of the record, along with something entitled "Key Comments and Findings in Minnesota Hearings."

[The prepared statement of Senator Durenberger appears in the appendix.]

Senator DURENBERGER. Mr. Chairman, let me just say first, by way of compliment to Jim Brady and Justin Dart, that people who have been lucky like they have all over the State of Minnesota have been doing a lot for my ignorance in the last couple of months. I cannot think of anything more exciting that I have done in a long time than be finding myself as the ranking member of the subcommittee on disabilities with Tom Harkin, and working with you, Mr. Chairman, and this excellent staff that has put in so much work to make the principled bill, the ADA, what it is today.

I find that my appreciation for the wide variety of abilities that God has given the human being that I cannot see with my eyes and I cannot hear with my ears is just absolutely incredible. And all of you have given me the opportunity—as I go back to Minnesota next week, we are going to have hearings in St. Cloud and Duluth and Moorhead and places like that—have given me the opportunity to discover these incredible abilities that all of us have but that some of us, like the folks up here, never get to use, and that Jim and Justin and a lot of other people in this room have discovered ahead of us.

So I am really pleased that this day has come, that the Attorney General is here to speak on behalf of the administration. We all now have had occasion to memorize every quotation that George Bush ever made about the Americans with Disabilities Act, and now we have got his real life representative here. I know that Dick Thornburgh as a person and George Bush as a person are very, very committed to what we are about. I am glad I am not the Attorney General. I am glad I am not like my ranking member on this committee, on the Judiciary Committee, so that I am looking at all the little legal nuances of all of this sort of thing. I am very pleased to be the principal Republican co-sponsor of this bill, and I hope that after this hearing today and the commitment that the Attorney General and the President make to working with this we will find time somewhere in July for a markup at an appropriate time in which we can be partners with the administration. And I look forward to the quick passage of this bill.

The Chairman. Senator Hatch?

Senator HATCH. If I could just say a word of welcome to our distinguished former colleague, Lowell Weicker, here. I agree with Senator Harkin that he has probably done as much for people with disabilities in America, as anybody. Lowell, we are proud to have you here. We welcomed you informally before, but I would like to just welcome you formally as well.

The Chairman. General, we are glad to have you here. We appreciate having you as the spokesman for the administration. I think all of us are very mindful of your ongoing and continuing and strong commitment to the cause of disabled individuals in this country. We appreciate your presence here today, and we look forward to your testimony.

STATEMENT OF HON. RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Attorney General Thornburgh. Thank you, Mr. Chairman, distinguished members of this committee.

It is a great pleasure for me to be able to present to you the administration's views on the proposed Americans with Disabilities Act. Twenty-five years ago to this day, Congress and the President were putting the finishing touches on the Civil Rights Act of 1964, the most important civil rights legislation ever passed. It is exciting for me to be part of the process which, this year, will pass legislation that will extend the Nation's civil rights guarantees to the disability community. Persons with disabilities have already made enormous contributions to American society and can and will contribute even more as legislation goes forward in this Congress to improve their even greater entry into the mainstream.

It is estimated that there are over 36 million Americans with disabilities. President Bush has consistently supported efforts to bring these Americans into the "mainstream" of American society. As Vice President, he stated that we must develop programs and policies that promote independence, freedom of choice, and productive involvement in the social and economic mainstream. This means access to education, jobs, public accommodations, and public transportation--in other words, full participation in and access to all aspects of society. This year, in his remarks to the Joint Session of Congress, the President reiterated this commitment. We at the Department of Justice wholeheartedly share these goals and commit ourselves, along with the President and the rest of his administration, to a bipartisan effort to enact comprehensive legislation attacking discrimination in employment, public services, transportation, public accommodations, and telecommunications.

Despite the best efforts of all levels of Government and the private sector, and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. Fifteen years have gone by since the Rehabilitation Act took effect. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life. The unreasonable and, in most cases, unthinking failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, and telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit from the richness of American society. The continued maintenance of these barriers imposes staggering economic and social costs and inhibits our sincere and substantial Federal commitment to the education, rehabilitation, and employment of persons with disabilities. The elimination of these barriers will enable society to benefit from their skills and talents and will enable persons with disabilities to lead more productive lives.

Efforts to develop comprehensive legislation to ensure equal opportunity for persons with disabilities should, of course, also be mindful of other principles as well. First, any new legislation should take into consideration the existing fabric of Federal laws prohibiting discrimination on the basis of handicap. During the past two decades, Congress has enacted a series of statutes focusing on a wide range of problems and providing an intricate web of enforcement procedures. The courts and Federal agencies have also been active in interpreting these laws, defining the meaning of non-discrimination in the context of disability. Any new legislation should be coordinated with this body of law in order to avoid inadvertent conflicts, confusion, the inefficient use of enforcement resources, and unnecessary litigation.

New legislation prohibiting discrimination on the basis of disability should use as its model the panoply of civil rights laws prohibiting discrimination on the basis of race, color, national origin, and sex. We must end the anomaly of widely protecting women and minorities from discrimination while failing to provide parallel protection for people with disabilities.

New legislation should also be designed to keep the development of intrusive Federal regulation to a minimum. It is this administration's goal to regulate the private sector only in those situations where it is necessary and only to the extent called for by the problem at hand. Concerns for the economic efficiency of America's businesses, especially its small entrepreneurs, and for competitiveness in the world economy must be given due weight. Legislation which unduly burdens American businessmen and—omen is ultimately in no one's interest. Federal action in this area should likewise recognize that States can act, and most have already acted, to protect the rights of persons with disabilities in ways tailored to each State's particular circumstances.

Finally, the issue of costs, both the fiscal cost of lost income tax revenues and increased transfer payments when disabled persons are not accommodated and the cost of accommodating persons with disabilities, must be considered. Careful consideration must be given to whether the line on costs has been drawn in the proper place, and we will need to work together in the weeks ahead on this.

The cost issue is made more difficult because it is virtually impossible to put a price tag on the accommodations required by any bill in this area. For example, while widening an existing doorway will cost $300 to $600, no one can estimate with any degree of reliability how many doorways will need to be widened. Making accurate cost predictions is also hampered by ambiguity in the standards enunciated in S. 933.

Similarly, we must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country. As with the area of costs, we have found it difficult to quantify the exact economic benefits of legislation in fiscal terms. Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increased earnings, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues.

With these principles as a guide, I would like to address the Americans with Disabilities Act of 1989. This committee is to be commended for its efforts in drafting S. 933. One of its most impressive strengths is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections. In some areas, there are overlapping pieces of fabric, duplication that has resulted in confusion and counterproductive enforcement efforts. The administration supports the legislative efforts to enact a bill that is at one time cohesive, coordinated, and comprehensive.

I am pleased that S. 933 includes provisions pertaining to job discrimination. Perhaps the most glaring omission in the landscape of disability rights laws is that there is nothing in the Federal law that prohibits discrimination in employment in the private sector against those with disabilities. While persons who work for the Federal Government, who work in federally assisted programs, or who work for certain Federal contractors are protected from discrimination on the basis of handicap, most other workers are not. Each year in this country, over 150,000 young men and women with disabilities complete their education under the Education of the Handicapped Act, some receiving high school diplomas, some receiving certificates of completion. This education law has been one of our modern successes in the disability area. But if our investment in the education of these students is to bear fruit, we must ensure that they face an employment arena similarly free of discrimination on the basis of handicap.

President Bush endorses your concept of paralleling in the disability area Title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination on the basis of race, color, national origin, sex, and religion. Furthermore, it is the administration's view that such legislation should use the standard provided by Section 504 of the Rehabilitation Act of 1973—the concept that non-discrimination includes the requirement that an employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons as long as making the accommodations would not result in an undue hardship on the operations of the employer.

The Chairman. General, I am reluctant to interrupt you, but I had a request by one of our colleagues who has to go to the Armed Services Committee in just a few moments on an important matter which he has a very direct interest in. So I would be glad, if it is agreeable with you, to recognize Senator Coats for an opportunity for brief questions. I know we are proceeding out of order and out of turn, so we appreciate your accommodation.

Senator COATS. I thank you, Mr. Chairman.

Mr. Attorney General, I did not mean to interrupt your complete statement. I would be happy to allow the Attorney General to finish, although if you feel—I apologize for the intrusion on the committee.

The Chairman. Everyone is hard pressed. I am going to ask the Senator from Iowa, Senator Harkin, who has been chairing the hearings in any event to take on that responsibility as we go into the final debate on the ABC bill in just a few moments.

Senator Coats. I thank the Chair and the indulgence of my colleagues. I would just ask a couple of very quick specific questions relative to the bill before us, the legislation before us, as well as the legislation currently in place, the 1973 Rehabilitation Act.

I am particularly interested in pursuing the question that comes regarding Section 101 of the ADA on the qualifications standard. Subsection (B)(2)(a) indicates that current use of alcohol or drugs by an alcoholic or drug abuser not be a defense unless the employing entity determines that it poses a direct threat to the property or safety of others in the workplace or the program.

My question is: Does not this legislation require employers to make difficult, if not impossible, determinations relative to the dangers posed by an individual's drug use? I think on the face of it, and we have a substantial body of evidence that indicates that drug use does pose, is almost inherently a problem and a dangerous problem. I am just wondering if we are not putting the employer in an impossible situation here where it cannot institute necessary testing procedures, necessary workplace standard procedures to exclude or to impose restrictions on drug users in the workplace.

I am concerned about this standard, and also as it applies to the 1973 act. I wondered if you had an opinion or had an opportunity to look at that question.

Attorney General Thornburgh. Let me try to respond to that, Senator, by jumping ahead a couple of paragraphs in my statement, where I note: Of course, any legislation must be consistent with Federal drug-free workplace initiatives. I need not remind this committee of the scourge of illegal drug use in this country and its frightening impact on daily American life. We believe that this bill should make clear that substance abusers should not be included within the protections of this civil rights statute. The bill should also be fully consistent with this administration's commitment to the eradication of substance abuse in the workplace and elsewhere.

That is as clearly and succinctly as I can state the administration's position in the area that you have inquired about.

Senator Coats. I appreciate that very much, Mr. Attorney General. As I noted, the provisions of this act are on a collision course with, as is the Rehabilitation Act of 1973 on a collision course with other statutes that have allowed for the attempts to put in place drug-free workplace, drug-free schools. I have heard from principals and employers across the State of Indiana saying we are betwixt and between on this. We want to, from a safety standpoint, from a health standpoint, from a morale standpoint, from a quality work product standpoint, from an attitude standpoint, behavior standpoint in schools, move forward in dealing with drug abuse and alcohol abuse in the workplace and in the schools; and yet we are running into lawsuit after lawsuit claiming that these are handicapped individuals within the meaning of the 1973 Rehabilitation Act, and it would be further protected by this legislation.

So I just want to indicate to you and to the chairman and the chairman of the subcommittee that my interest is in resolving what I see as a real conflict here. I have introduced legislation to do so, and I wanted to raise that.

Again, I thank the chairman for the time. We have an important markup session in Armed Services which I need to be at. I also would like to submit some written questions, if I could. I thank the indulgence of my colleagues.

The Chairman. All the members will be entitled to submit written questions. We will proceed and have the Senator's exchange at an appropriate place in the record.

Attorney General Thornburgh. Let me just amplify a bit, Senator Coats, the administration's position on this question, which supports a very clear distinction between those persons who are addicted to illegal drugs or who have been convicted of drug trafficking, and those who are addicted to alcohol or legally prescribed drugs who are currently provided with protection under Section 504. It is not our intention to remove that protection because that protection, coupled with the increasing number of employee assistance plans that are available for persons with alcohol or legal-drug abuse problems is quite a different problem than the matter of persons who are using illegal drugs who are subject to the provisions of Federal, State and local laws regarding criminal conduct, or in an even stronger case those who are involved in trafficking in those drugs. That distinction I think is important to make, but I believe that applying that distinction with current 504, a change and accommodation in the current draft of S. 933 can be effected to implement both the desire for a drug-free workplace and the recognition that Section 504 extends current protection to those who are outside of the gambit of illegal criminal conduct.

I was referring, Mr. Chairman, to the provisions which would parallel Title VII of the Civil Rights Act of 1964 and would note further that such a law would be a major step forward for persons with disabilities. We must be mindful, however, of the cost burdens that this law, more than any other civil rights laws, will place on businesses. It is our goal here to seek a balance to bring persons with disabilities into the mainstream of American economic life and reduce the cost to society of exclusion, while at the same time keeping the American economic system strong and viable. We are concerned with the impact of S. 933 on small businesses. Because small businesses have limited financial resources, they do not have the advantage of spreading the costs of accommodations over a large payroll. Further, their small work force gives them limited flexibility in restructuring jobs, a frequently used method of making reasonable accommodations. For these reasons, the administration would like to join the dialogue with this committee on the appropriate extent of coverage for smaller employers.

The inclusion of public accommodations in the Americans with Disabilities Act is a Federal recognition of their importance in American life. Just as Title II of the Civil Rights Act of 1964 opened up restaurants and theaters to black Americans, S. 933 promises to persons with disabilities the ability to enjoy full participation in our American way of life. The administration endorses the prohibition of discrimination on the basis of disability in public accommodations. Recent studies show that persons with disabilities are too often discouraged, for example, from attending concerts, going to restaurants, and attending movies. We recognize that requiring public accommodations to make themselves accessible to persons with mobility impairments and to provide auxiliary aids to those with visual and hearing impairments could result in significant costs. We would like to work with this committee to develop provisions that will ameliorate this cost burden. Similarly, we need to work together to define the parameters of coverage in this area. We think that modifications to S. 933 should address our concerns regarding the scope of public accommodations.

We also seek a bill in this area that will provide clear guidance so that unnecessary and costly litigation can be avoided. Great care should be taken in crafting a standard for what constitutes discrimination. It may be preferable to use terms and concepts from Section 504, a law that now has a nearly 16-year history, rather than developing new terms and standards. Finally, any new legislative initiative should avoid potential confrontation with the First Amendment to the Constitution that might arise with the coverage of religious institutions.

The provision of accessible transportation for persons with disabilities has been one of the most complex issues faced by Congress and the executive branch. Four statutes and a series of current Department of Transportation regulations present an inter-related, complicated set of obligations. Several Federal circuit courts have interpreted these statutes and rules—not always in harmony. The President agrees with this committee that additional legislation is needed to set the record straight. We must be careful, however, that our efforts clarify the picture rather than adding to the confusion.

Our goal, and yours, is to ensure that persons with disabilities have access to adequate transportation in this country, and we support legislation that would focus our efforts on publicly funded transportation services. We recommend enactment of a bill that would, for the first time, guarantee that public bus systems in this country be accessible to persons with mobility impairments. Thus, legislation should require that all new public buses be accessible to persons with disabilities. The Secretary of Transportation should have the flexibility to relax this requirement for any municipality where accessible bus service would prove to be impractical. For instance, in localities with extremely inclement climates where wheelchair lifts do not function for much of the year, it may be more practical to provide accessible paratransit service. Because the average life of a bus is 12 years, accessible bus transportation would become a reality in this country in a relatively short period of time, except for the cases where accessible buses are ineffective. As with other sections of S. 933 that involve State and local government services, my experience as a Governor teaches me that it will be important to get input from the affected officials and people with disabilities from around the country before finalizing these provisions.

In addition, legislation should also require paratransit services that supplement, rather than duplicate, the fixed-route bus service. Ideally, paratransit service should be aimed at those severely disabled persons who are unable to use mainline accessible transportation.

Again, we should recognize the cost implications of these requirements. In the public transportation area, a considerable percentage of the capital costs of public transit authorities is borne by the Federal Government. It is unlikely, given existing fiscal constraints, that any substantial amount of new monies will be available in the Federal budget for transportation. Thus, these increased costs for accessibility must be carried out within already planned outlays. Given these fiscal restraints, we think some reasonable limitation on paratransit service costs may be appropriate, and we are prepared to discuss with the committee the level for such a limit.

On another matter, the administration agrees that a comprehensive bill should address the issue of making our Nation's telecommunications system accessible to deaf persons. The inability to communicate by telephone renders the routine tasks of daily living—such as making a doctor's appointment or inquiring about a job opportunity—difficult or even impossible to accomplish for those with hearing impairments. Establishment of a telecommunications relay service is clearly a vital step toward full integration of deaf persons into the mainstream. Legislation addressing this issue should, however, take into account the ongoing Federal Communications Commission inquiry mandated by the Telecommunications Accessibility Enhancement Act, and preserve the maximum degree of freedom for the FCC to use its expertise in determination which specific requirements will result in the most cost-effective and efficient system.

BEcause S. 933 uses existing civil rights laws for minorities and women as its model, the remedies under this bill should parallel these existing laws. For example, the enforcement procedures and remedies now available under Title VII of the Civil Rights Act of 1964 should be used for violations of discrimination based on disability in the employment area; and Title II's enforcement scheme should be available to redress discrimination based on disability in places of public accommodation. This approach is fair and easy to implement. It would provide persons with disabilities with a full array of remedies, including preventive relief and reimbursement for out-of-pocket expenses, including back pay. In addition, use of enforcement mechanisms already in existence would ease enforcement and eliminate inconsistencies and confusion among those who have to comply with the law.

I have witnessed the many faces of discrimination confronting persons with disabilities. As noted, over 36 million people in this country are disabled by reason of some physical or mental handicapping condition. The mere existence of these conditions does not for many of these individuals prevent them from interacting freely with others in society, or from performing the tasks that others perform on a daily basis. But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society—notions that have, in large measure, been created by ignorance and maintained by fear.

It is precisely these sorts of antiquated attitudes that have blocked people with disabilities from entering the mainstream of American life. Certainly, attitudinal changes cannot be simply commanded or even legislated out of existence. No particular court order or single piece of legislation can alone change long-standing perceptions or misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the development of a comprehensive set of laws supported by a helpful set of regulations that all work together to promote the integration of people with disabilities into our communities, schools, and workplaces.

Mr. Chairman, the Americans with Disabilities Act can be the vehicle that brings persons with disabilities into the mainstream of American life. On behalf of President Bush, I pledge to this committee and to the Congress our full support for comprehensive civil rights legislation for persons with disabilities.

We have a historic opportunity to move this legislation expeditiously through the Congress given the broad support for its purpose. Administration representatives are prepared to begin the task immediately of meeting with your respective staffs and those of other principals, such as Senator Dole, to work in good faith towards a consensus of all the issues. During this process, meetings at the principal level would also be beneficial in resolving any major policy questions that arise.

In that spirit, I would urge that the committee not let an artificial deadline, such as a markup, stand in the way of completing this crucial task. I see no reason why a productive effort could not result in such a consensus within a relatively short period. Faced with the opportunity of enacting landmark legislation, a few more days of careful work would be time well spent in my view.

I thank you for the opportunity to testify on this legislation. The administration looks forward to working constructively with you on this enormously important piece of legislation.

Senator HARKIN. [Presiding.] Mr. Attorney General, thank you very much for a very comprehensive statement regarding the administration's position on this legislation.

I also would like to introduce someone else who is in the audience: The Chair of the National Council on Disability that was established under former President Reagan. Again, it was the National Council on Disability under her leadership that first proposed this legislation well over a year-and-a-half ago. I want to recognize a great national leader in the effort to get this comprehensive legislation passed, and that is Sandy Parrino, the Chair of the National Council on Disability. I just did not see her sitting there before. Sandy, glad you are here.

Senator SIMON. Mr. Chairman?

Senator HARKIN. Yes, Senator Simon.

Senator SIMON. I was just going to say that Senator Metzenbaum and I are faced with the same problem that Senator Kennedy and Senator Hatch have. That is, we are in a markup right now in the Judiciary Committee. If you could yield just for a 3-minute statement from each of us, we would appreciate it.

Senator HARKIN. I would be delighted to do so. I was not aware of that conflict. Please, go ahead. I recognize the Senator.

Senator SIMON. First of all, let me just say I find your statement hopeful, and I am aware that you personally are aware of the problems of the disabled. I have found over the years that some of the people because of a personal involvement have been very, very helpful. Lowell Weicker is a good example of somebody who has really led and contributed to the Nation. Tom Harkin is another.

Just a few observations quickly. One, you mentioned we do not want to hurt small business. The bill exempts 15 or more. I gather you would want to raise that some. I am not opposed to raising it some, though the more you raise that number in terms of the numbers of employees where you exempt people, you are diminishing the employment opportunity.

I was pleased at your mentioning the education area. The reality is 54 percent of people are unemployed who have disabilities a year after they leave school.

Then one other thing. You mentioned the FCC. Frankly, I want to make realistic accommodations, but the FCC has, candidly, just not been very responsive to the needs of the disabled. I want to be reasonable with them, but I think they have to be shoved.

Then, finally, you mentioned the area of transit services, and my staff just pointed out to me the testimony of Harold Jenkins, who is general manager of the Cambria County Transit Authority headquartered in Johnstown, PA. I would like to just read just a few sentences from him.

"As a result of our educational efforts, we carried an average of 200 passengers a month in wheelchairs during the first 11 months of operation in 1980; that is, 200 per month with only seven accessible buses. By 1983, our entire fleet of 27 buses was accessible with the result that we now carry over 3,000 passengers in wheelchairs every year. In addition, we annually transport about 36,000 passengers with other disabilities, and we carry this number despite our inclement weather and hilly terrain. Why? Commitment. A strong commitment to quality transit. We are in public transit to provide transit to the public. It is that simple. Persons with handicaps are members of the public. Therefore, we view the cost of equipping and maintaining buses with lifts as we do other expenses. It is the cost of doing business."

I am skipping over some sentences here. "We have carried about 15,000 passengers in wheelchairs since 1980 and 1983 and have never received one complaint from ambulatory passengers about time delays due to wheelchair transport."

It is an example of what can be done, and I think this bill in this area seems to me to be reasonable, simply requiring that new transit facilities be accessible. And I do not know that we need to compromise any more than that, frankly. I think that is a move in the right direction.

Again, I want to just say I appreciate your attitude and your general thrust that we can do better in this country, and I think working together we can get something done here. I appreciate it.

Thank you, Mr. Chairman.

Attorney General Thornburgh. Senator, I am proud that you cited Harold Jenkins, who, as you pointed out, is a Pennsylvanian and with whom I worked on some of those problems that he refers to. They have an outstanding public transit authority in Johnstown, Pennsylvania, and you have given due credit to them for their efforts in this regard.

Senator SIMON. Thank you.

Senator HARKIN. Thank you, Senator Simon.

Senator Metzenbaum?

Senator METZENBAUM. Thank you very much, Mr. Chairman.

First, I want to commend you, Mr. Chairman, for your leadership in this area. I want to say how much I appreciate the Senator from Iowa's leadership, and I feel the time has come when we will pass this legislation.

It is to be noted that one of the major witnesses this morning is the distinguished Senator Lowell Weicker. He provided such able leadership and was out there in the forefront of this area as well as many others, while he was in the Congress.

I think Jim Brady is testifying this morning. I do not see him, but I just left his wife a little bit ago where she and I were working on a different subject.

Mr. Attorney General, I am very pleased that you are here, that your attitude and the administration's attitude is supportive and conciliatory. I feel confident that we should be able to work out something provided the administration will go 95 percent of the way and we will go five, or something like that. [Laughter.]

We want to be very reasonable about that, as you can appreciate.

In earlier hearings, we heard living testimony from highly qualified people who could not get jobs because employers saw only their disability; what they could not do, not what they could do. We heard people with disabilities recount heart-rending and shocking stories of being kicked out of restaurants and turned away from movie theaters simply because they are disabled. If a person was told to leave a restaurant or movie theater because that individual is black or Jewish or a woman, we would find it unacceptable, morally repugnant. We would find it outrageous, and, yes, it would be against the law.

We are here today to say that it is just as unacceptable, just as morally repugnant and outrageous to discriminate against a person because he or she is disabled. This legislation will do much to resolve that problem. I am very pleased to join with the chairman of the subcommittee and hopefully with the administration in bringing about the passage of this legislation at the earliest possible date.

Mr. Chairman, I ask that my statement be made part of the record.

Thank you, Mr. Chairman.

[The prepared statement of Sentor Metzenbaum appears in the appendix.]

Senator HARKIN. I want to again personally thank both of you: Senator Simon with whom I worked in the House and who has been such a leader on P.L. 94-142 for so many years in education; and Senator Metzenbaum who has just been a stalwart supporter of including within the mainstream of our society all those who have been left out, and in the last segment, as you so generously expressed just now, on the disabled, to bring them into the mainstream of life. Again, I just want to thank you, Senator Metzenbaum, for your lifetime of work to make sure that we get this bill enacted.

Senator METZENBAUM. Thank you.

Senator HARKIN. Mr. Attorney General, before I ask any questions, I want to personally commend you and your Department for taking the first meaningful implementation, action, this week to enforce the new Fair Housing Act provisions regarding discrimination on the basis of handicapped in housing.

For all of you who do not know what I am talking about, there is a suit that was filed in suburban Chicago by the Attorney General's office, and I think it is very encouraging. I understand it is aimed at discouraging and preventing neighborhoods and communities from illegally preventing persons with mental retardation from living in homes in those communities. As just one individual, I hope you are successful in this litigation. I hope that you continue to aggressively pursue additional cases where warranted.

Again, I want to thank you and the Justice Department for your prompt enforcement of the Fair Housing Act. I look forward to the time when we can have another conversation and praise you for your vigorous enforcement of the Americans with Disabilities Act, too, in the not too distant future.

I am appreciative of your time, Mr. Attorney General, but this is a very important piece of legislation. A lot of people have put a lot of time and effort into it. I would like to just go through some questions with you, a few of a general nature and then a few to specifically get into the transportation, public access, things like that.

First, in drafting this bill, my colleagues and I were guided by eight basic principles which I outlined in my opening statement. It appears from your testimony that President Bush and the sponsors of this legislation are in general agreement on these principles. I just wanted to explore some of these with you.

The first principle, as I said, is that discrimination against people with disabilities is still pervasive in our society. My understanding of your testimony is that the President believes that discrimination against people with disabilities is pervasive. Is that correct?

Attorney General Thornburgh. That is correct, yes.

Senator HARKIN. The second principle is that people with disabilities are entitled to lead independent and productive lives, to make choices for themselves, and to be integrated and mainstreamed into society. Every witness that we have had reaffirmed this perception, both the Council that I said under the leadership of Sandy Parrino and others.

In June of 1988, then Vice President Bush stated that because of unnecessary segregation and exclusion, "disabled adults and families with disabled children suffer from stress, dependency, and isolation."

At the Republican National Convention, Mr. Bush stated, and I quote: "I am going to do whatever it takes to make sure the disabled are included in the mainstream. For too long, they have been left out, but they are not going to be left out any more."

Based on your testimony, it would appear that the President does, indeed, want to integrate and to mainstream the disabled in our society. That would be correct?

Attorney General Thornburgh. Correct.

Senator HARKIN. The third principle is that people with disabilities are entitled to meaningful access to all aspects of American society. Again, the importance of this principle is restated throughout the hearing. Bob Bergdorf from the Easter Seals Society, for example, Mr. Attorney General, said that "It makes no sense to bar discrimination against people with disabilities in theaters, restaurants, or places of entertainment, but not in regard to such important things as doctors offices." Further quoting Mr. Bergdorf, "It makes no sense for the law to say that people with disabilities cannot be discriminated against if they want to buy a pastrami sandwich at the local deli, but they can be discriminated against next door at the pharmacy where they need to fill a prescription. There is no sense to that distinction." That is a quote, again, from Mr. Bergdorf.

On March 31, 1988, again, Vice President Bush stated, and I quote: "Our society cannot ignore the needs of this excluded population. We must develop programs and policies that promote independence, freedom of choice, and productive involvement in the social and economic mainstream." Again, further quoting the Vice President, "This does not merely mean employment. It also means access to the mainstream educational system, public accommodations, public transportation—in other words, meaningful access to all aspects of society."

Just last week before the Very Special Arts Festival that we had here in Washington, where we had kids from every State, and I forget how many foreign countries—I think over 50 foreign countries were here—President Bush stated, and again I will quote: "You are all on your way to the kind of life that I want to see for every American—a life of independence and opportunity and productive involvement in our mainstream. That means a commitment on society's part to end discrimination, to increase access and opportunities in our schools, on the job, and in every aspect of our society."

So, again, I am pleased that your testimony again today once again reiterated the President's commitment to make access a reality—again, I emphasize the words—in every aspect of our society. I assume those words were chosen, and you reiterated that.

Attorney General Thornburgh. I think that is conceptually correct, Senator. However, I think it is important to note the concern that the administration has in examining the specific parameters in the public accommodations area to the extent that they go beyond what Title II of the Civil Rights Act provided. It is not that we are necessarily drawing the line there, but that is an area I think is appropriate for further discussion to make sure that when we are sailing into unknown waters we have a clear notion of what our direction is and what perils may be there. But, conceptually, there is no question but what the President holds to the views that you express.

Senator HARKIN. I appreciate that, and I have a couple of specific things on that that we will get into in just a minute.

The fourth principle was that in order to ensure independence, productivity, and integration, we need a comprehensive civil rights legislation. Again, I am pleased that the President has reaffirmed this commitment to a comprehensive civil rights bill. On March

31st of this year, he stated, and again I quote: "In order to assure that every American who wants a productive job in the private sector has a job, I continue to support initiatives to improve transportation and workplace accessibility for existing facilities." I am also pleased that at least with respect to public transportation that the President agrees with the principle that transportation plays a crucial role. Again, I assume that that also is included in your testimony, that we need a comprehensive legislation. I believe you so stated, not a piecemeal but a comprehensive legislation. Would that be correct?

Attorney General Thornburgh. There are some differences between the administration view in the area of the extent to which these provisions should presently extend to private transportation systems, the concern there being primarily one of cost burdens which would not be aided and assisted by the 80 percent portion of those expenditures that are picked up by the Federal Government in connection with public transportation systems; and, again, an area which could have an enormous impact, particularly in rural areas where small transportation, private transportation companies serve a very limited constituency. That we feel would be an area that requires more study than has been forthcoming at the present time.

In the public transportation area, however, our commitment with respect to—as Senator Simon outlined—all new buses being fully accessible which with turnover rates would result within a very short period of time in having a totally accessible bus fleet, plus paratransit facilities as a supplement to be used to reach those with particular needs, I believe is entirely consistent with what the bill contains.

Senator HARKIN. The fifth principle was that it is not economically feasible to remove all architectural and communication barriers in existing facilities, but that improvements can be made in existing facilities, and that we can and must insist on full accessibility in new facilities. Again, all the witnesses at the hearings concurred with this principle.

Ron Mace, an architect, made the point that when access is taken into consideration in the design of new facilities, the additional costs are really negligible.

On March 31, 1988, then Vice President Bush stated, and again I quote: "In order to assure that every American who wants a productive job in the private sector has a job, I will continue to support initiatives to improve transportation and workplace accessibility for existing facilities, and insist on accessibility for all new construction."

As you know, the Justice Department in the ADAPT case recently argued that all new buses need not be accessible and that mainstreaming and integration in transportation are not a fundamental principle of Section 504 of the Rehabilitation Act. I assume by your testimony today that with respect to the ADA that President Bush endorses the principle of integration and on insisting that new buses be constructed so as to be accessible to people with disabilities with certain exceptions.

Again, am I correct in assuming that all new facilities will be accessible, and that new buses be constructed as to be accessible to people with disabilities?

Attorney General Thornburgh. That is correct, and I think it is an important distinction to note between present Section 504, where the Department of Justice and Transportation have taken the position that you outlined under present law, and the President's support of the provisions in 933 that would expand that law as you have outlined. These are not, I hope the Senator understands, necessarily inconsistent provisions.

Senator HARKIN. I understand that.

Attorney General Thornburgh. It is that we are dealing with different provisions of different laws.

Senator HARKIN. I wanted to make that point clear on that transition aspect.

Attorney General Thornburgh. One other thing I might mention with regard to physical barriers, just to ensure that the record is clear: We find the introduction of new terms and definitions in ways that do not necessarily comport with the terms and definitions contained in Section 504 to be counterproductive, and would hope that some discussion could ensue in making these internal definitions consistent between the legislation forthcoming on dealing with persons with disabilities with those statutes that govern other protected classes under the civil rights laws. We recognize we are dealing with different situations because, in many cases, the barriers are physical in dealing with persons with disabilities, while in dealing with other protected classes that is not the case. But the introduction of undefined terms or vaguely defined terms or terms that conflict with those already in existing law we would hope would be subject to further discussion.

Senator HARKIN. I want to return to that point because I want to talk about the readily achievable aspect. I think that is probably what you are talking about, Mr. Attorney General.

Attorney General Thornburgh. Yes.

Senator HARKIN. I do want to come back to that.

The sixth principle is that we must balance the legitimate rights of people with disabilities with the legitimate concerns of the business community, particularly small businesses. Again, your testimony seems to agree with the need to strike that proper balance between those two interests.

The eighth principle was that the Americans with Disabilities Act is not only the right thing to do, but it is also the right course of action to strengthen our economy and enhance our international competitiveness. Again, it appears from your testimony that President Bush believes that the ADA will save billions and will provide a labor pool to address upcoming labor shortages. I have not even had a chance to read it yet, but my counsel showed me an article that was in the New York Times this morning talking about that labor pool nation-wide. Again, I assume from your testimony that basically the administration agrees that this will open the labor pool and that it will save us a lot of money.

Attorney General Thornburgh. I think it is fair to say that putting aside the concerns that I believe we all share about the decency and compassion that is due persons with disabilities, if one were to even take a look at this in a cold-hearted accounting sense, that the availability of an increased work force and the greater productivity that can ensue from our economy as a whole through opening up these kinds of opportunity, provides reason in and of itself to pursue this. I think that the Senator has noted a very important component that is often overlooked in the examination of legislation designed to open up employment opportunities in particular.

Senator HARKIN. The final principle was that a right without a meaningful remedy is meaningless. We heard testimony from numerous witnesses. The Attorney General from Illinois, Attorney General Hardigan, testified that without the existence of damages as a remedy, you would not get widespread voluntary compliance or negotiated settlements, short of litigation.

The original ADA included provisions for damages. The revised ADA includes references to current enforcement schemes, including the Fair Housing Act scheme which Congress just recently enacted and which President Bush has wholeheartedly endorsed.

Do you agree that the policy embedded in the Fair Housing Act that damages may be required as an alternative remedy is also one that is applicable here in the ADA bill?

Attorney General Thornburgh. I think the view that the administration holds to is that this act should not be one designed to promote unnecessary litigation. The fair housing amendments of last year were adopted only after years of experience with the previous regimen of remedies, and I think that I can fairly express the view of the administration that those remedies are not necessarily appropriate for transport into a new piece of legislation without some similar experience in obtaining voluntary compliance and in securing the kinds of remedies that have been used in other civil rights areas, without particularly going to punitive damages and some of the more novel remedies proposed in this act, such as giving persons a right to enjoin action which is about to result in discrimination.

Again, before that kind of uncharted water is entered into in the remedial sense, some thought, I think, ought to be given to sticking with the remedial regimen that is contained in the present civil rights laws.

Senator HARKIN. Let me understand this. Attorney General Hardigan testified just the opposite. He said that with that provision of damages in there that it would decrease the amount of litigation because it would promote people actually sitting down and working things out in a non-litigious manner; but that without that provision of damages that litigation would more likely ensue under the other provisions; but that with the provision of damages in there that it really would compel an atmosphere of more voluntary compliance.

I understand that under the Fair Housing Act we have damages.

Attorney General Thornburgh. We do now.

Senator HARKIN. We do now. But you are saying that we need a different standard for the ADA?

Attorney General Thornburgh. I am told, although I was not in the Department at the time, that one of the observable phenomenon from the passage of the Civil Rights Act of 1964 was the enormous amount of voluntary compliance that took place, and that to immediately, in opening up a new area of law and remedy, take the Housing Act as the model for this legislation would truncate the opportunity to obtain that kind of voluntary compliance here, particularly in the public accommodations area, for example.

We are a litigious society, Senator Harkin, whether we like it or not, and there are a lot of people out there that the first thing they want to do is sue somebody, and particularly when you have provided punitive damages, which we learned from recent experience can be somewhat limitless in their reach. We are merely making a plea for the tried and true remedies under Titles II and VII of the Civil Rights Act of 1964, which not only provide for more voluntary compliance but limit the amount of litigation that is necessarily going to ensue, and the prospect of having that litigation, in fact, prove an obstacle to achieving the goals that we seek.

I do disagree with Attorney General Hardigan, if that is the long and short of it, yes, based on the experience that the Department has had.

Senator HARKIN. Congress recently expressed itself in the Fair Housing Act Amendments. It was supported bipartisanly. It was passed. It was signed into law by the President, and it did——

Attorney General Thornburgh. Based on years of experience and a determination that in that area the remedies to which I refer had not proved sufficient. To make that judgment at the front end of the process seems to me to be——

Senator HARKIN. But we had no experience with disability. Disability was included in 504. Damages were included for the disabled. That is part of it. Congress passed that, and the President signed it.

I guess what I am concerned about is that we are not going to overturn 504. We are trying to make this bill as compatible with existing legislation so we do not have all these little places out there where things are different. We have had 504 since the Rehab Act. But the Fair Housing was just recently passed, and that included these provisions.

What would happen if you have damages in there in the housing area but you do not have it in these other areas? It seems to me that not only is inconsistent but——

Attorney General Thornburgh. I do not know what would happen, and I think that is the reason why some caution is appropriate here to examine what the experience might be. The amendments to the Fair Housing Act, as you point out, were made after years of experience and some frustration in accomplishing its goals. You do not necessarily assume that that is going to be the case here. But I think what we are seeing in this dialogue is the need for some discussion of the history and setting of these various remedies. Our position is one of uneasiness with going to the extreme, and particularly in the area of punitive damages.

Senator HARKIN. Well, we will look forward to continuing those discussions, again, keeping in mind that we just passed the Fair Housing Act and included that in there.

Let me talk a little bit more about public accommodations. You stated that we need to work together to define the parameters of coverage in the area of public accommodations. You probably heard my statement that different people testified to, you know, what difference does it make if you can go into a restaurant or a deli but you cannot get into the pharmacy of the doctors 'offices. Again, the President has said that he wants meaningful access to all aspects of society.

Well, should a Federal law require access, as I said earlier, to a deli so that a person with a disability could buy a sandwich but next door could not go in to visit a doctor or get a prescription filled? Is it the administration's view that somehow we have to specifically limit these areas in this legislation?

Attorney General Thornburgh. I think what has to be examined is the coverage of the public accommodations language. How many public accommodations are covered will depend to a great extent on the definition that is given to "reasonable accommodation." The more that is required in the way of accommodation, the more careful we have to be in extending the scope of what is now provided for under Title II. And I hope that that kind of examination would be at the top of the list of things that should be considered in reaching some specificity on this.

Senator HARKIN. Well, but the standard we used was "readily achievable," requiring changes that are readily achievable. Now, again, are you saying that we have to be more specific than that?

Attorney General Thornburgh. It is an undefined term.

Senator HARKIN. I guess, Mr. Attorney General, I am trying to find out about the existing facilities. Is it appropriate to require retrofitting of existing facilities to make them fully accessible?

I kind of ask that rhetorically because I do not believe so. Is it appropriate to require the retrofitting of all existing facilities to make them fully accessible?

Attorney General Thornburgh. That is the question I think that has to be examined in looking at something that is readily achievable.

Senator HARKIN. Well, we have answered that. We have said no. I mean, there is no way that we could put that burden on businesses. Obviously, it would be very prohibitive.

Then I said: If it is too expensive to retrofit, should we require that the services or goods be made available regardless of the cost? Well, we cannot do that either.

Well, then, is it appropriate to do nothing? We cannot do nothing either.

That is the range of options we have: fully accessible for everybody, make all the goods and services available, or do nothing. That is sort of the range that we have. What we picked out was basically what we thought was a reasonable middle ground, readily achievable.

There are other standards that are much higher than that in existing legislation, and 504 program access is much tighter than this. We made this readily achievable. Now, if you have some suggestions on how we might further define this to fall within those extreme parameters or everything or nothing, I am willing to look at that.

Attorney General Thornburgh. 504 uses the language "undue financial and administrative burden," which seems to me to be preferable in terms of identification of what is being sought and readily achievable. Again, I do not think that—what we are trying to do is to indicate some concern for the reach of the public accommodations provisions.

Senator HARKIN. Well, as I said, we have tried to—we had concerns with it, too, because obviously we knew that we could not just mandate everything. And we did not want to just do nothing, so we had to have some middle ground.

Attorney General Thornburgh. Well, I do not think that we are stating a position, Senator, that calls for doing nothing.

Senator HARKIN. No.

Attorney General Thornburgh. I think what we are looking at is those areas of public accommodation that go beyond what is in Title II and what kinds of standards are to be applied in that area. I do not find the readily achievable language to be specific enough to answer the questions that are inherent in the physical accommodations that have to be made for persons with disabilities, which are quite different in terms of those accommodations that have to be made for persons based on their gender, their race, their religious preference or ethnic origin. I suggest only—I do not have the answer, Senator, to be honest with you.

Senator HARKIN. I do not either.

Attorney General Thornburgh. I suggest only that this is an area that ought to be discussed in considerable detail before an undefined term is adopted at unknown cost and with unknown consequences to all of the prospective public accommodations that might be effected.

Senator HARKIN. Well, in the spirit as we have developed this legislation as we have gone along, I look forward to working with you and the administration to flush that out a little bit more. Certainly, we can make a record on that. If you have another choice of words other than "readily achievable," perhaps we can look at that, or use "readily achievable" and somehow make the record as to just sort of what we mean by readily achievable.

Attorney General Thornburgh. I think to complete that record, there ought to be some reference to the requirement to furnish auxiliary aids in what the act says, if there is no undue burden. That, again, is an area that is I think ripe for some further consideration in view of the presently existing standards that are used under 504.

Senator HARKIN. Well, we look forward to working with you on that. Let me just cover one more area that I really want to go over, and that was the public transportation aspect of it.

We have heard Senator Simon talk about I think Harold Jenkins. Again, you said in your testimony about making lifts on buses in areas of inclement weather. Again, Mr. Attorney General, with all due respect, I think that perhaps this is a concept that has gone on for a long time because of old technology. We have new technology that answers those questions right now, and we have received adequate testimony from people all over the country that this really is not a legitimate concern any longer.

Harold Jenkins testified that Johnstown, Pennsylvania, is an area that is quite hilly, we receive a lot of snow, receive a lot of water through flooding, yet his system is a hundred percent accessible.

Again, I think the notion that lifts are not workable or are problematic in cold or inclement weather is refuted by experience. We have Denver, Colorado; Johnstown, Pennsylvania; Champaign, Urbana, Illinois; Buffalo. Here is a letter that I will insert in the record, Mr. Attorney General, from the Paralyzed Veterans of America which I just received.

[The letter of Mr. Capozzi appears in the appendix.]

Senator **Harkin**. The writer of the letter, who is the National Advocacy Director, David Capozzi, said that he is a native of Buffalo, New York. In Buffalo, 196 of the 427 fixed-route buses were equipped with wheelchair lifts. He said, "Let me tell you, it does snow in Buffalo. However," he said, "people still use the transit system when the weather is bad." He said, "I do not know of many areas of the country where on a consistent basis the weather is so inclement that people with disabilities cannot usually gain access to the bus."

He goes on further, "It is also not true any longer that lifts are unable to work in icy or snowy conditions. What may have been true with the first generation of lifts in the 1970's is not true with the current generation of wheelchair lifts."

I think perhaps if I might just say that I think that fears that lifts will not work in cold weather are explained by several factors. Problems reported with lift maintenance generally trace from unreliable first generation lifts that were produced. Secondly, most problems with lifts result either from poor maintenance or lack of adequate training of bus operators. The Architectural Transportation Barriers Compliance Board has reported that most problems with lift operation are the direct result of driver error, and that lift maintenance is but one facet of a good maintenance policy. Transit agencies reporting problems with lifts are generally those not have good programs of general maintenance. Lastly, problems with lifts are generally traceable to a lack of commitment by the transit authorities.

Again, this is what Mr. Jenkins testified to. He said, "Look," he said, "if you want to, you can do it." He said, "We wanted to make them accessible in Johnstown regardless of the weather, and we have done it. And we have trained our bus drivers. The first thing they do"—I went through it all—"when they come in in the morning, they make sure it works. They have the proper maintenance. It is just part of their checkout procedure once they take the bus out." And he said it really is just a commitment to maintenance, and he does not believe—and all the testimony we have received is that this really is not a legitimate concern about making some differences for areas with inclement weather.

Attorney General Thornburgh. Please do not misunderstand our position, Senator, as I am afraid you are slipping into doing. We do not oppose the use of lifts. We call for every new bus to be fully accessible. The only caveat that was inserted was at the request of the Department of Transportation to have the flexibility, after developing a record where these contraptions may not work—I do not know what kind of experience Secretary Skinner had in Fargo, North Dakota, which I can imagine can be much worse than Buffalo when it comes to snow. But, apparently, there are areas where these lifts do not work. But that should not be—that caveat for some flexibility based on the development of a record where these may not work should not be misunderstood as in opposition. We are firmly committed to the notion that every new bus purchased by a public transit authority in the United States should be fully accessible, period.

Senator **Harkin**. I really appreciate that. I am glad we got through that question. I had one more on private buses. I will submit that in writing. I know that Senator Weicker has to leave, but I thought it was very important to make this record because we do have some fine points and some fine areas that we do want to work out. I just wanted to make sure that we understand where we were coming from on these issues in terms of readily achievable, the accessibility on buses we just talked about, and the public accommodations section that we are just going to have to work out. I look forward to working with you on it. I know of your intense interest in this area. Believe me, I appreciate it very much.

Attorney General Thornburgh. We are sincerely committed and are extremely hopeful that you and your staff and your colleagues will take us up on the offer to roll up our sleeves and go to work immediately to produce a bill that we can all agree upon and that we can get to work in enforcing, Senator.

Senator **Harkin**. We will, just keeping in mind that a lot of this ground has been plowed already, and I hope we can focus on just those few areas that now need it and not go back and do some of that other stuff.

Attorney General Thornburgh. I believe we can.

Senator **Harkin**. Thank you, Mr. Attorney General.

Attorney General Thornburgh. Thank you.

[The prepared statement of Attorney General Thornburgh appears in the appendix.]

Senator **Harkin**. The next witness is the Honorable Lowell Weicker, former Member and chairman of this specific subcommittee, a good friend. I apologize, as I said, Lowell, publicly. I just thought it was very important to get some of these things on the record for our future negotiations so that we can get this legislation moving. I know you have to leave. I would again welcome you and compliment you again.

I am sure that everyone in this audience knows the lifetime of work and dedication that Lowell Weicker has put into this effort. There is not a better champion anywhere in this country for the rights of not only the people who disabled but the rights of all those who have been left out of our society.

It is an honor to have you back, Lowell.

STATEMENT OF HON. LOWELL P. WEICKER, JR., RESEARCH! AMERICA, ALEXANDRIA, VA, AND FORMER UNITED STATES SENATOR FROM THE STATE OF CONNECTICUT

Senator **Weicker**. Thank you very much, Mr. Chairman,

I might add, what a refreshing change from Bradford Reynolds to Dick Thornburgh.

Senator **Harkin**. Isn't that great? Sure is.

Senator **Weicker**. I will also say this: If you are going to have to leave—and none of us like to do that, but I have got to also say that this job has been left in very, very competent and compassionate hands insofar as your being the chairman of the subcommittee.

Senator HARKIN. Thank you very much.

Senator WEICKER. Mr. Chairman, I come before you today as a parent of a child with a disability, as a former chairman of the Subcommittee on the Handicapped, and now as president of a coalition furthering medical research, to discuss legislation which I believe should be the highest priority of the 101st Congress: The Americans with Disabilities Act.

The 43 million Americans with disabilities have waited long enough to be equal in the eyes of the laws of the United States.

For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for black; it is not for the disabled.

It is true that, over the last 16 years, we have begun to alter the direction of public policy. With the enactment of Section 504 of the Rehabilitation Act of 1973, Congress said that no longer will Federal funds support or assist discrimination, and last year we reaffirmed that commitment in the Civil Rights Restoration Act. In 1975, with the passage of Public Law 94-142, we said that children with disabilities had a right to a public education, and that no longer would we allow such children to be educated outside of the mainstream of our society. That directive was expanded in 1986 by Public Law 99-457. Most recently, in the Fair Housing Amendments of 1988, we said that no longer will we build multifamily housing that does not allow all Americans inside.

The legislation before this committee today completes the work begun in 1973 to secure the rights of Americans with disabilities. It provides a place in society for everyone. It does not guarantee you a job. It guarantees that you will not be denied a job on the basis of your disability. This bill looks to the future, not to punishing society for the sins of the past. It lays out a clear blueprint for the future: A blueprint that says when a community buys a new bus, it buys a bus that everyone can use; a blueprint that says when new buildings are constructed, they must be usable by persons with disabilities; a blueprint that says our phone system must be usable by everyone.

I would like to take a moment to remind the members of this committee that the Americans with Disabilities Act would not be before you today were it not for the work of the National Council on Disability. Members of that Council are Presidential appointees, and all were appointees of Ronald Reagan when they developed this historic legislation. From Justin Dart, a long-time stalwart of the Republican Party, to Jeremiah Milbank, the founder of the Eagle Forum, I daresay no one has ever challenged the conservative political credentials of any of those 15 members. After much internal deliberation, they came forward with a bill that was one of the most progressive, comprehensive civil rights legislation since the Civil Rights Act of 1964. And when their work was completed, they came and asked, as the ranking Republican on the Handicapped Subcommittee, if I would be the lead sponsor in the Senate. I said I would be proud to do so.

Yet as one who knew the difficulty of furthering any new legislation, much less legislation for persons with disabilities, I knew that nothing would be accomplished except on a bipartisan basis. And so in the next breath, I asked them to see Tom Harkin, not because he is a good friend and a compassionate man, but because as the chairman of the Handicapped Subcommittee, his active leadership was critical to the future of the Americans with Disabilities Act. Together we could much; separately, nothing.

The fact is disability legislation has always been a bipartisan effort. And no one knows it better than the members of this committee. There was not a bill that came through this committee in my memory that was not co-sponsored and fully supported by the chairmen and ranking members of the full committee, as well as the Handicapped Subcommittee. Every one of those bills passed this committee unanimously, and every one of those bills was signed into law.

Today, the bipartisanship on this bill continues, with 11 Republicans from all ranges of the political spectrum joining in the battle. I cannot emphasize enough that the divisiveness of partisanship has no place on a bill that will guarantee the civil rights of Americans with disabilities.

Not only is this bill the appropriate humanitarian step for the 101st Congress, the Americans with Disabilities Act makes good economic sense as well. Right now, we have a system that is based on dependence, with over $57 billion a year in Federal funds going for social insurance benefits for disabled persons. The economic return to society when people get off the welfare rolls and become employed cannot be overstated. With two-thirds of disabled Americans unemployed, and 82 percent of those persons willing to give up benefits if they could work full-time, it can only mean a reduction in welfare dependency if those persons have real opportunities to participate in the workforce.

Now, Mr. Chairman, I understand the need for a compromise, and I want to commend you and the chairman of the full committee, Senator Kennedy, and the subcommittee ranking member, Senator Durenberger, for working with those who have expressed legitimate concerns about the bill in an effort to come up with equitable, workable solutions to some of the issues raised. I have to tell you, though, that I think the changes made on this legislation go far enough.

Now, Mr. Chairman, there are two admonitions that I would like to deliver here this morning that are not in my prepared remarks. One goes to the Congress, and then, to be even-handed, one goes to the administration. I would hope that when this legislation comes out of the committee—when it comes out of the committee—it will apply to the Congress of the United States as well as to the rest of the Nation.

[Applause.]

Senator WEICKER. I might add, I do not say that now that I am no longer a Member of the Congress of the United States because I made that comment, if you will recall, at the time the bill was introduced awhile back.

Senator HARKIN. That is true.

Senator WEICKER. The other admonition is to the administration. This bill is going to involve cost. There is a lot to be done. If this is merely a statement of our good intentions, of our idealism as Americans, and nothing more, then we do a disfavor to the disabled of this Nation.

I realize everybody has made their pledge of no new revenues. We have tried to freeze that in place. Unfortunately, you cannot freeze life. And the matters that are discussed in this bill are going to cost. Make no mistake about it. Again, like everything else, those will be up-front costs that, if paid, will be more than compensated for in the future. But no one should delude themselves that this is a freebie.

It was Congress and the executive branch that when 94-142 was passed guaranteed that the Federal share would be 40 percent. It has never gone past eight or nine percent, and because of that many youngsters in this Nation are unable to avail themselves of the state of the art. Therefore, they have no future.

I think it is wonderful that we have a Special Olympics day once a year. It is a happy moment. It is an emotional moment. But what about the other 364 days of the year that are snatched away from those very youngsters because they cannot avail themselves of the education that is due them? So when we pass this legislation, let us not make any excuses for the fact that if, indeed, our idealism is to be expressed, it also carries a price tag.

Now, while fine-tuning may be necessary, any further substantive changes would, I believe, seriously tilt the scales against securing full civil rights for persons with disabilities, and thus demean the constitutional spirit in which this endeavor was conceived.

The fact is this legislation now enjoys support from every segment of the disability community. From the deaf and hearing impaired, to persons infected with HIV, to those with physical and mental disabilities, there is nothing less than enthusiastic support for this bill. Over 100 organizations have been working tirelessly on behalf of Americans with disabilities. Do not frustrate them now. Theirs has already been a lifetime spent overcoming not what God wrought but what man imposed by custom and law.

As most of you know, I have a son with Down's syndrome. Sonny is 11 years old. Thanks to the vision of you and your predecessors, he has spent his life in public schools with non-disabled peers. When Sonny completes school, he will go out into the world ready to take his place in society, along with everyone else. This bill, then, is a follow-on to Sonny's future: With it, he will be able to live where he wants, get on a bus, go to work wherever his talents will take him, and relaxation will mean movies and restaurants as for anyone else. Without ADA, his ability to do any of those activities will rest on the whim of society, and that simply is not good enough in America.

Disabled persons may represent a minority in this country, but they are a minority any one of us may join at any time. Indeed, the latest research indicates that Sonny will probably join the disabled ranks for a second time. As reported in the New England Journal of Medicine this month, Down's persons are at greater risk to develop Alzheimer's by age 50. That gives me 39 years to find through research a resolution of the fate that awaits him.

However, in a matter of months, you can secure to Sonny and his 43 million peers a happiness that only comes with love equally devised and equally administered.

Thank you very much.

[Applause.]

Senator HARKIN. What else can be said? After that, you know why we all love you so much, Lowell, and I mean that very much.

I know you have to leave. I want to just talk about that one area that you brought up that you said was not in your remarks, the second part. Obviously, I agree with the first, but the thing about the cost. We are going to hear a lot about that. It is going to cost a lot to do this, but a lot of that—I tell you, we have gotten so much testimony, and I know you have heard it, too, Lowell. In the past, we have gotten so much testimony it is going to cost so much. In fact, I did not even take it up with the Attorney General, but in his statement he said something about doorways would cost $300 or $400 and how many doors. But with just changing hinges on doors, you might be able to get the right width that you need. By doing little things that do not cost very much money, you can make things accessible. Just a little Yankee ingenuity.

We had testimony from one person, a woman who was denied a job as a secretary in an office because they could not get the wheelchair under the desk, and because they moved them around to different work stations it would cost a lot of money to get new desks, new work stations. She went down to the local rehab office, and they cut four blocks of wood about three inches high, took them down there, and if you just set the desk on that, it worked just fine. The cost was nothing. Just a little bit of ingenuity. So, first of all, a lot of this talk about cost I think is just blown completely out of proportion.

Second, on the overall cost to society, we had Danny Piper in from Ankeny, Iowa, to testify before the committee. Like your child, he has Down's Syndrome. His parents started working with him when he was very young. In fact, I just saw his folks who were in Washington here just a few weeks ago. Danny is still not quite out of school, will be I think in two more years, but he has a summer job working in a drugstore stocking shelves. He has been brought along. He even testified himself. Imagine that, a kid with Down's Syndrome testifying before a Senate committee, looking forward to the day when he can go out and have his own place to live. He has his own job, and he can do all of that.

You talk about costs. His mother and father estimated that had they followed their doctor's advice and institutionalized Danny when he was very young, he would still be in the institution today. Today it costs about $200 a day for a kid like to be in an institution. If he lived in that institution for all of his life, let us say up to age 64, that cost would be $4,745,000, just for the cost of institutionalization. But Danny is not going to be institutionalized. He is going to go out and work; he is going to make money; he is going to take care of himself. So when you look at the cost, you got to look at the cost to all of society. We know it is going to save us billions of dollars.

You know that as well as I do, and that is the story that all of us have got to get out to the business community, to those that are concerned about this change, that it is going to save us billions of dollars if you just want to look at it in cold, hard, economic terms, not to mention what it is going to mean for the life enhancement of these people with disabilities.

Senator WEICKER. That is absolutely correct.

Senator HARKIN. Lowell, you are wonderful. I do not have any other questions.

Senator Kennedy?

The Chairman. Mr. Chairman, I apologize. I was not here for the presentation, but I did have an opportunity to read the excellent statement of our friend, the Senator from Connecticut. The words are one factor, but Senator Weicker is always able to add a special dimension to those words.

There are just two areas that I would like to just ask Senator Weicker about. I think he is a real expert in both of these areas besides other areas of the legislation. That has to do with the remedies. Senator Weicker was a strong supporter of the efforts that we made last year in terms of the fair housing legislation. That really followed after the legislation in 1968 where we tried to assure that there was not going to be discrimination in the areas of housing.

Of all the civil rights bills that were passed in the 1960's and early 1970's, that really failed, most egregiously. And I think any fair kind of valuation of the reason for those failures is because it did not have strict remedies. It did not have the remedies that other provisions of the Civil Rights Act had that were both included in specific legislation and also were applicable with other court decisions on the 1981 provisions.

I know that the issue of remedies was addressed briefly by the Attorney General here this morning. And I do not know whether I am fair in characterizing his view about it, but I have heard the administration express reservations about whether we ought to include the kind of make whole remedies in this bill that have been included in the fair housing legislation. I think maybe some can say, well, we passed the 1968 act; we had to find out that it did not work; and then eventually we fixed it up in 1988. But in those 20 years, people were discriminated against in a very cruel and harsh and unfair way.

As someone who is not only familiar with this legislation but also with the housing legislation, I wonder whether you might just make a comment, about the importance the kind of remedies which are included in the Americans With Disabilities Act.

Senator WEICKER. I sure will, Senator. Again, I want to thank you for all that you have done during the course of the years on the behalf of the disabled while I have that opportunity.

Let me just use two examples as to the importance of remedy. I spent, along with the Senators here, many of the Senators, a whole year fighting an effort on the floor of the United States Senate to strip the Supreme Court of its abilities to apply remedies. "Court-stripping" it was called. And what were they talking about? Everybody liked to use the term "busing." Forget busing. The issue was whether a court, once somebody had convicted of violating the laws of the United States, could apply a remedy. I am not here to argue whether the remedy is right or wrong, but to apply a remedy.

Obviously, it was worth the efforts of those that were against civil rights to spend a year's time trying to strip the courts of the ability to remedy established wrongs. Clearly, for those that do not want civil rights, in whatever form, this bill included, have no remedy section or an ineffective remedy section, and then you got no law.

Then the last experience, which I know both of you gentleman shared, is when we tried to get—because the inclination of society is to wear down those that are trying to achieve their place within the laws of this Nation. Remember the attorney's fee bill where those parents that brought successful suit to establish their children's rights under law were to be allowed attorney's fees, and the battle we had over that?

I might add everybody, not just the Government, but PTA's and school boards and everybody else, did not want their parents to have access to those attorney's fees, because they realized that they had the tool in their hand to effectively eliminate 95 percent of those that were coming to seek their rightful place in society just by wearing them down. So make no mistake about it. There had best be in here effective remedies; otherwise, again, you have a wonderful statement by the Congress of the United States, nothing to back it up, either in terms of remedy, or, as I earlier alluded to, hopefully it will not occur, but nothing to back it up in terms of funding.

The Chairman. Well, I appreciate that because there should be an institutional memory on that issue. You hear, "We are all for that bill with the exception of scope and remedies." If I could, I will just get back to the issue of scope, the importance of the Title IV provisions. Cutting back on Title IV would be, I think, absolutely unacceptable, but nonetheless we hear that talked about.Some say they we are for all these other provisions but not for full coverage of Title IV of this billI.

Maybe there is just a brief comment that you would make on that, too, because again we have seen what it has meant in terms of one aspect of public policy in the areas of civil rights, and there is every reason to believe that it can make the same kind of difference in terms of the whole disability movement. I will hear you out on that for just a minute.

Senator **Weicker**. I remember my exact words on the floor of the United States Senate on the court-stripping bill. I said: You know, today it is black school children who are unpopular. Maybe tomorrow it will be unpopular to be old in America or unpopular to be disabled in America.

That was the issue then. That will always be the issue. Without a remedy, there is, practically speaking, no right.

The Chairman. I want to thank you very much for taking the time and for being here. Again, your whole experience in this, on all the handicapped issues, has been absolutely extraordinary for our country. We want to thank you for being our concluding witness. It really makes a great deal of difference, and we appreciate your taking the time to join us.

Senator **Harkin**. I hate to keep you any longer, but may I just ask one last thing on this whole thing of remedies? You heard the Attorney General and I get into this thing about damages. We have had testimony that having the damages in there as pursuant to the Fair Housing Act, which we just spoke of, the Congress just passed that, the President signed it into law providing that. He said that may be different than here.

There is one body of thought that says if you have the damages that that really promotes voluntary compliance; that if you have the damages there, it promotes people sitting down and working these things out. If you do not have them there, they will just keep stretching it out and stretching it out, and they will not come to any resolution of it.

The Attorney General feels that by having the damages clause, as I understood what he said, that would promote litigation. There are others who say if you have it there it will decrease the possibility of litigation. Do you have any thoughts on that, Lowell?

Senator **Weicker**. Let me tell you—and, again, I repeat what I said at the outset of my statement—this is a long cry from William Bradford Reynolds, this man. He is a fine man, Dick Thornburgh, and I think you are going to work out your differences fine. But this business that it is going to promote litigation, do you honestly think that there is one person out there that wants to litigate? You got to be crazy. They have got plenty to do in their lives to make it without lawyers and courts and litigation. So the hell with the litigation. That is not what anybody wants, as a practical matter, and that is exactly the way I would view the statement saying, well, if it is in there it promotes litigation. Nobody wants to litigate; everybody just wants to get on with their life.

Senator **Harkin**. I am glad I asked you the question.

[Applause.]

Senator **Harkin**. Thank you very much.

[The prepared statement of Senator Weicker appears in the appendix.]

Senator **Harkin**. If I might engage the chairman in a little discussion?

The Chairman. Before we go into adjournment, I want to just express my very great appreciation to the Senator from Iowa for conducting these series of hearings. I think they have given a full opportunity, an examination of the various issues which have been raised and commented on. I think a very strong record has been made in support of the bill. I know the Senator from Iowa, as well as myself, and the Senator from Utah are glad to work with the administration. We have appreciated their positive response today. There are items which they have raised which will have to be worked out. We welcome the opportunity to do so.

I want to reiterate that we have every intention of having a markup after we return in July. We want to move this legislation. We will move the legislation through the committee and then try and move it on to the floor at the earliest possible time. So I think we have some period of time now during these next two weeks in particular to be able to work out these matters.

It is our intention to move to an early markup. We have stated July 12th as the date. We will make every effort to conform with that date. We want to within that period of time certainly give the administration the opportunity to concretize their own recommendations. So we are moving along. We want to give the assurances that as far as I am concerned we are going to keep on moving along until we get the consideration on the floor of the United States Senate. We hope to do that at the earliest possible time.

Again, I want to thank the Senator from Iowa for the way he has conducted these hearings and for the record that has been made. He has really done an outstanding job, and we look forward to working with him as we move this whole legislative package forward.

Senator HARKIN. Mr. Chairman, thank you very much.

[Whereupon, at 11:39 a.m., the committee was adjourned, subject to the call of the Chair.]

APPENDIX

Statement of Senator Edward M. Kennedy on Americans With Disabilities Act

May 9, 1989

I am pleased to join in sponsoring of the Americans with Disabilities Act. 43 million Americans with disabilities deserve the opportunity to be first class citizens in our society.

The road to discrimination is paved with good intentions. For years, because of our concern for the less fortunate, we have tolerated a status of second class citizenship for our disabled fellow citizens.

The Americans with Disabilities Act will end this American Apartheid. It will roll back the unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society by mindless biased attitudes and senseless physical barriers.

The timing of this bill has special significance in the history of civil rights. This year we celebrate the 25th anniversary of the Civil Rights Act of 1964. That legislation helped bring about one of the greatest peaceful transformations in our history for millions of Americans who were victims of racial discrimination, and this legislation can do the same for millions of citizens who are disabled.

The Americans with Disabilities Act applies to both the public sector and the private sector. It prohibits discrimination on the basis of disability in employment, public accommodations, transportation and communications. Its goal is nothing less than to give every disabled American a fair share of the American dream.

The removal of physical barriers and access to reasonable accommodations are among the most essential elements of this measure. The lunch counter sit-ins of the early 1960's led to the great public accommodations title of the 1964 Act. But if the students demonstrating at those lunch counters had been in wheelchairs, they could not have made it through the door of the establishment. If Rosa Parks had been disabled, she could not have boarded the bus at all.

Accessible transportation is the lynchpin for integration of the disabled. It does little good to open the doors of institutions, to provide rehabilitation and early intervention programs, if the disabled can not even leave their homes and move freely in society. Disabled Americans deserve a better future in their communities than to be relegated to sitting in front of television sets in their homes.

Reliance on paratransit facilities often means no transit at all. Paratransit is called a "demand-response" system, but to many of the disabled it is a "beg-deny" system. Hundreds and sometimes thousands of disabled citizens in every city languish on paratransit waiting lists, hoping for rides which are denied, or which are provided under strict limitations -- only to see the doctor, or only until 3:00 p.m. on weekdays, or only 5 trips a month. The restrictions are endless. Under these conditions, no human being can work, raise a family, or function normally in society.

In every era, society is confronted with the challenge of dealing with those who are disabled. All too often, out of fear and misunderstanding, the reaction is to shun those who are afflicted. Half a century ago, our response to the polio epidemic was to close swimming pools and instruct children to avoid the water fountain at their school. Many Americans once felt compelled to whisper when mentioning cancer in their family -- fearing that it might be transmitted through casual contact. Even today, young adults suffering from an acute phase of multiple sclerosis are treated as drunk, and older Americans with unrecognized Alzheimer's Disease are rebuked for behavior beyond their control. Most recently, we have seen the impact of fear and misinformation in the treatment of people with AIDS. I have heard from individuals and families whose homes have been torched and whose lives have been threatened.

In every case, science, public health and painful experience have shown that the appropriate reaction is not to fear or to isolate, but to reach out with assistance, understanding, and support.

In no instance is this response more essential than in the epidemic of AIDS. Beyond the fundamental issues of fairness and justice for individuals, protections against discrimination for people with HIV disease are essential to protect the public health. We cannot expect to bring this devastating scourge under control unless we make it possible for individuals who believe that they may be infected to come forward for counseling and testing.

If the price of seeking professional medical guidance is the potential loss of employment, public accommodations, and vital services -- we cannot possibly expect those at greatest risk to participate in prevention and treatment programs.

The legislation that we are introducing today is designed not only to protect individuals with disabilities -- but to protect the general public health and the integrity of our society.

Some will argue that it costs too much to implement this bill. But I reply, it costs too much to go on without it. We are spending billions of dollars today in the federal budget on programs that make disabled citizens dependent, not independent.

We need a new way of thinking. The short term cost of this legislation is far less than the long-term gain. Disabled does not mean unable.

Vast resources can be saved by making disabled Americans productive Americans. They deserve to participate in the promise of America too. May the enactment of this legislation be the first of many steps in a new effort by Congress and the Administration to redeem that promise.

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From the office of

SEN. ORRIN HATCH

Washington, D.C. 20510

May 9, 1989 Contact: Paul Smith, 202/224-9854

STATEMENT OF SEN. ORRIN HATCH
BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
HEARING ON AMERICANS WITH DISABILITIES ACT

Thank you, Mr. Chairman. The story of America is one of ever growing inclusiveness. It is a story of more and more people being drawn into the great American mainstream and of increasing numbers of Americans being able to participate in the activities of a free society to the fullest extent of their God-given abilities. Persons with disabilities are writing a wonderful new chapter of this quintessentially American story every day.

I support a comprehensive civil rights bill for persons with disabilities. I favor extending the substantive protections of Section 504 of the Rehabilitation Act of 1973 to employment; to public accommodations as that term is defined in the 1964 Civil Rights Act; to state and local governments, including their public transit activities; and to television broadcasters in the broadcast of videotapes. I have an open mind on the telecommunications relay services section and the coverage of private transportation.

As you know, Mr. Chairman, we have had conversations about disability civil rights legislation as have our staffs, and I hope these conversations will continue.

I continue, however, to have serious concerns with the Americans with Disabilities Act, as I understand it will be introduced today. In terms of its coverage of public accommodations, it sweeps far beyond its parallel provision in Title II of the 1964 Civil Rights Act. It appears to encompass virtually the entire private sector by its definition of "Public accommodation," which includes "establishments that are used by the general public as customers, clients, or visitors or that are potential places of employment, and whose operations affect commerce." This includes not only theaters, restaurants, and hotels but also all sales establishments, grocery stores, drug stores, factories and plants in all industries, clothing stores, appliance stores, office buildings, professional services such as dentists, doctors and others, private schools including private religious schools, and much more of the private sector which is not covered by Title II of the 1964 Civil Rights Act. They are swept in under this bill, even though they receive no federal aid or federal contracts. If this provision remains remotely as is, I see no way to pass such legislation in this Congress.

I am concerned that the bill does not contain adequate exemptions for small entities. For example, there is no exemption in the public accommodations section.

(MORE)

I am also concerned that the requirements of the bill, in a number of places, exceed their requirements of Section 504.

The remedies imposed under this bill in several instances are too harsh and far exceed relief available under parallel civil rights statutes. We need to strike a reasonable balance whenever we extend government regulations and mandates on the private sector and state and local governments. Again, these relief provisions render the bill unlikely to gain passage. For example, and this is just one example, a black person discriminatorily turned away from a public accommodation like a bar or hotel can obtain injunctive relief and attorneys fees under Title II, and the Attorney General can obtain injunctive relief only. The relief available to a person with a disability discriminatorily turned away from a bar or hotel or other public accommodation under this bill includes, in a private action, not only injunctive relief, attorneys fees and costs, but actual and punitive damages. In an Attorney General action under this bill, relief may include not only injunctive relief, attorneys fees and costs, but also monetary damages to aggrieved persons, and civil penalties of up to $50,000 for a first offense and up to $100,000 for subsequent offenses. This is not parallel enforcement.

Relief in the employment context for discrimination on the bases of disability should parallel the relief available under Title VII of the 1964 Civil Rights Act. This bill, however, adds to that relief the remedies and procedures available under 42 U.S.C. 1981. This statute affords all persons "the same right...to make and enforce contracts, to sue, be parties, give evidence...as is enjoyed by white citizens..." It is privately enforced. Thus, under this bill, relief for employment discrimination includes not only up to two years' back pay, the next available job, and retroactive seniority, as is available under Title VII, but backpay which is not limited to two years, compensatory and punitive damages, and the right to a jury trial available under Section 1981. Once again, this bill unnecessarily exceeds the obvious model, Title VII.

In light of my concerns about the Americans with Disabilities Act and my strong conviction that Congress should enact a comprehensive bill, I may find it necessary to introduce my own bill or join one offered by another colleague.

Mr. Chairman, I look forward to hearing from witnesses during these hearings on these and other areas of my concern.

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STATEMENT OF SENATOR TOM HARKIN HEARING ON THE AMERICANS WITH DISABILITIES ACT OF 1989

MAY 9, 1989

Today we are embarking on an historic endeavor: passage of the Americans with Disabilities Act of 1989 (ADA).

The ADA is a bill of rights for our siblings and relatives, friends and neighbors with disabilities; their emancipation proclamation.

The ADA isn't just the right thing to do, it's the right way to address our deficit and help put our economic house in order. Lou Harris recently found that "not working" is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the age of 16 and 64 are not working at all; but a large majority of those not working say that they want to work. Sixty-six percent of working age disabled persons, who are not working, say that they would like to have a job. What this means is that about 8.2 million people with disabilities want to work but can't find a job.

Lou Harris also found that the majority of those who are not working, and who are out of the labor force, must depend on insurance payments or government benefits for support. Moreover, eighty-two percent of people with disabilities would give up their government benefits in favor of a full-time job.

Further, Lou Harris found that three-fourths of top management believe that persons with disabilities are discriminated against by employers. Thus, ending discrimination will have the direct and immediate effect of reducing the federal government's expenditures of over $60 billion dollars per year on disability benefits and programs premised on dependency. It will also have the immediate effect of making people with disabilities into consumers and taxpayers.

With the passage of Public Law 94-142, this country promised a free and appropriate education to all of its children with disabilities. And yet, with no national policy prohibiting discrimination on the basis of disability, what kind of message are we sending these children in whom we have invested so much?

I want to share with you a story about one of my constituents, a terrific kid from Ankeny named Danny Piper. Danny was born with a developmental disability 19 years ago, at which time the doctors told his parents that his case was hopeless and he should be placed in an institution. His parents rejected this recommendation, and Dan has lived at home with his family, attended an early intervention program, preschool education program and is now in high school.

Despite the fact that Danny can live independently, his parents are fearful about his transition to employment. Last year, Dan and his mom, Sylvia, testified before the Subcommittee on the Handicapped on the Americans With Disabilities Act of 1988. Mrs. Piper told us: "We have invested in Dan's future. The State of Iowa has invested in Dan's future. And the Ankeny Public School District has made an investment in Dan's future. We fear that he will be denied employment based on disability rather than capability."

If we use Danny as a case study, I'll show you the cost of dependency. If Danny's parents had taken the advise of their doctor, and put Danny in an institution, Danny's mother thinks that he would still be in an institution today. Today, it costs $200 per day to be in an institution. If Danny lived in an institution for for his entire life, let's say for 65 years, the cost would be $4,745,000.

Danny wants to work and live in his own apartment. Lets give him and other persons with disabilities that chance by passing the ADA.

I want to give special thanks to Sandra Parrino and the National Council on Disability for their tireless efforts to educate us about the need for comprehensive civil rights legislation for people with disabilities. As many of you know, they were the authors of the ADA of 1988.

I also want to acknowledge the efforts of Senator Lowell Weicker, the chief sponsor of the Americans with Disabilities Act of 1988, and a life-long champion of people with disabilities.

I look forward to hearing all the witnesses.

Statement by
Senator James M. Jeffords
on
The Americans With Disabilities Act

Last year, the Task Force on the Rights and Empowerment of Americans with Disabilities, chaired by Justin Dart, visited all fifty states to conduct public forums on discrimination against people with disabilities. Across the country, the task force found that in many cases protections against discrimination on the basis of disability are either lacking or poorly enforced.

The evidence collected by the task force has laid the groundwork for action by Congress this year. This is the year that we must pass the Americans With Disabilities Act. We must make the dream of equal opportunity a reality for America's 37 million people with disabilities.

The Americans With Disabilities Act builds on earlier anti-discrimination statutes such as the Civil Rights Act of 1964, the Fair Housing Amendments Act of 1988, and most notably, the Rehabilitation Act of 1973. To a large extent, the Americans With Disabilities Act simply enhances the application of these earlier laws and in some cases extends to the private sector several of the safeguards against discrimination that already apply to the federal government.

The bill would affect discrimination on the basis of disability in employment, public accommodations, public services (including transportation), and communications. This year's legislation is slightly different from the version introduced in the 100th Congress, primarily in an effort to lower any costs associated with the bill, while preserving the objective of preventing discrimination.

Certainly, I am aware that there are still some concerns about the bill. The series of hearings that have been scheduled over the next few weeks should provide us with the information that we need to address these concerns and to consider any further adjustments to the bill that might be necessary.

So I am looking forward to the hearings and to action early in this Congress. As President Bush has stated, the passage of the Americans With Disabilities Act will provide nothing more than "simple fairness." Simple fairness for the millions of Americans who want nothing more than the opportunity to contribute their talents to our great nation.

Rep. Tony Coelho
before the
Senate Committee on Labor and Human Resources
May 9, 1989

THE AMERICANS WITH DISABILITIES ACT

Today I am introducing the Americans with Disabilities Act (ADA). This historic piece of legislation will prohibit discrimination against America's largest minority -- people with disabilities -- in employment, transportation, public accommodations, and the activities of state and local governments. It will provide disabled Americans comparable civil rights protections to those afforded on the bases of race, sex, national origin, age, and religion.

Most people do not regard disabled people as a large group, or as an unfairly treated group, or as an economically disadvantaged group. Yet disabled people constitute a major portion of our society. The last U.S. census numbered the disabled at 36 million. Estimates indicate that figure has risen to 43 million since then. And every day, many of those 43 million persons suffer some form of discrimination for no other reasons than the fact that they are disabled.

A nationwide poll conducted in 1986 by Louis Harris and Associates entitled Bringing Disabled Americans into the Mainstream determined that discrimination is frequently experienced by the disabled. The survey identified a variety of types of discrimination including lack of access to public buildings and public bathrooms, and the absence of accessible transportation. Clearly one-fourth of those interviewed said they personally had encountered job discrimination because of their disabilities. In a subsequent Harris poll of employers in 1987, three-fourths of business managers revealed that people with disabilities often encounter job discrimination from employers.

It is the responsibility of Congress as federal policy-makers to ensure that this discrimination comes to an end and our society is accessible to all: that wheelchair-users can travel and enter building to carry on normal economic and social lives; that crucial daily telephone communications are available to those with a hearing impairment; that jobs are not denied people with blindness and epilepsy and other disabling conditions; that people with mental retardation or other mental disabilities are accepted into their communities.

One of the major goals of the ADA bill is to eliminate discrimination against the disabled in employment. Statistics show that disabled persons experience staggering levels of unemployment and poverty. The percentage of disabled persons' families earning less than $5,000 is almost triple the national average. Some two-thirds of disabled people are unemployed, and when employed, they are consistently underpaid.

Colossal unemployment and poverty among the disabled often goes unchallenged because the public has the general impression that these are the inevitable results of disabling conditions. The absence of disabled co-workers by our side is taken as confirmation that disabled people can't work. Discriminatory attitudes hold that a person using a wheelchair, or a deaf or blind person can't perform a job. Quite often, minor adjustments in schedule or work distribution among employees or office structure and equipment is all that is needed to make a job perfectly do-able by qualified disabled applicants. Sometimes, no adjustments are necessary at all -- all the person needs is a chance.

Similar discriminatory attitudes hold that you can't employ someone with epilepsy because they may have a seizure on the job, when today the overwhelming majority of people with epilepsy have their physical conditions under control through medication. The same discriminatory attitudes hold that a person with a facial disfigurement or spastic condition is so repellant that they shouldn't be employed around others. Can we really go on accepting the fact that some persons are denied jobs simply because they don't look right?

Findings from the 1986 Harris poll indicated that "not working is perhaps the truest definition of what it means to be disabled. Two-thirds of all disabled Americans between the ages of 16 and 64 are not working. Only one in four works full time, and another 10 percent work part-time. Furthermore, unemployment among persons with disabilities as a group is a bigger problem than among any other demographic group of working-age Americans."

Another significant finding was that 66 percent of working age persons with disabilities, who are not working, want to have a job This overwhelming absences from the labor force of people with a strong desire to work is a tragic failure of the American dream and a waste of labor resources.

The majority of unemployed disabled people, if given the chance, are quite capable of taking their places in the job market. Numerous studies indicate that disabled workers perform as well as or better than their non-disabled co-workers. In 1983 the U.S. Commission on Civil Rights published a report on hiring the disabled entitled Accommodating the Spectrum of Individuals' Abilities. This report quoted an earlier government study of appointments of severely disabled workers to federal jobs over a 10-year period. The study concluded those employees' "work record is excellent." The 1987 Harris poll of employers rated the performance of disabled workers as "good to excellent."

Unemployment and underemployment of disabled persons cannot be explained by any differential in productivity. Studies dating back to a massive 1948 Department of Labor study have consistently concluded that disabled and non-disabled workers are equally productive. A survey of such research studies concluded: "...the existing literature appears to show both that the disabled who are working are as productive in their jobs as their co-workers and that employers perceived the handicapped as being comparably productive."

Another significant finding from the Harris poll dispels a common myth about the cost of hiring a disabled persons. "Seventy-five percent of managers said that the cost of employing persons with disabilities is not greater than the cost of hiring non-disabled workers." Similarly, studies show that accommodating disabled workers is viewed as inexpensive and on-burdensome to companies which have tried it.

Unfortunately, data from the Harris poll indicated that without some new stimulus, the employment of disabled people is unlikely to increase much. Most managers thought their company was already doing enough to employ disabled people and shouldn't make greater efforts to do so. Employers gave the hiring of disabled people a lower priority than the hiring of people from other minority groups and elderly persons. Furthermore, disabled people are the least likely to be viewed as an excellent source of employees.

A ban on employment discrimination will be necessary if the obvious potential of disabled Americans to work is to become a reality. Thus, the need is great for a strong national mandate such as the Americans with Disabilities Act.

Another pervasive form of disability discrimination is architectural and communication barriers in public accommodations. These facilities, including restaurants, stores, hotels, auditoriums, theaters, professional offices, parks, etc., have generally been designed for an ideal user with average physical proficiency. As such, they are inaccessible to many individuals with disabilities.

Though progress has been made in developing architectural standards to eliminate barriers in the construction of buildings, and despite the fact that nearly ever state has a statute prohibiting architectural barriers, such barriers continue to be a serious problem. The extent of inaccessibility was illustrated by a 1980 study of state-owned buildings which house services and programs available to the general public. The study found 76 percent of the buildings physically inaccessible and unusable for serving handicapped persons.

This situation exists even though eliminating architectural barriers does not have to be expensive. Study after study has shown that making new buildings accessible to disabled people adds less than one-half of one percent to the cost. Many corporations which have made it their policy to construct all new facilities to be barrier free have found that the costs are virtually absent and cannot even be found in a normal analysis of building costs.

Another problem area for the disabled is transportation. This most common service in our very mobile society is frequently denied to disabled people. The Congressional Budget Office described the extent of the problem this way: "More than one million physically disabled, blind, or deaf persons who live within a short walk of transit service cannot physically use it...An additional 4 million handicapped persons live near transit but find it difficult to use."

As interpreted by the National Council on the Handicapped in their 1988 report, On the Threshold of Independence, the 1986 Harris poll underscores the fact that transportation is a major problem for persons with disabilities. A clear majority of disabled persons state that their disability prevents them from getting around, socializing, or gong to cultural events as much as they'd like. Forty-nine percent of the respondents believe that their mobility is limited because they "are not able to use public transportation or because [they] can't get special transportation."

Transportation barriers not only limit social and community life, they also severely restrict employment options, and may explain a portion of the 66 percent of disabled persons who are without jobs. According to the Harris survey, approximately three out of ten people say that a lack of accessible or affordable transportation is an important reason why they are not working. As reported in the January, 1984 issue of Paraplegia News:

> Public transportation is something most Americans take for granted.
>
> Say what you will about your local transit authority -- the buses may be dirty and crowded, the drivers may be rude, and the fare may have doubled since last year -- but most people can be assured that there will be a bus going their way at 8:15 in the morning and 5:15 in the evening and most likely at decent intervals throughout the day as well.
>
> The picture changes dramatically if one...is physically unable to climb the stairs into a bus or train.
>
> Many transit operators have become enamored with "dial-a-ride" paratransit services. They point out that many disabled persons would rather be picked up and delivered door-to-door. I ask, what

> rational persons would choose a bus rather than a taxi if the price were the same?
>
> The truth is that van service cannot be operated with the same frequency and convenience as the existing bus or rail service. In many cities, disabled citizens must reserve rides days in advance, and waiting periods of several months (or even years) for enrollment into these programs are not uncommon. To provide even resembling mainline services would be prohibitively expensive.

Another edition of Paraplegia News looked at the issue in another way:

> Perhaps the best way to consider the best way to consider the appropriateness of paratransit as a substitute for mass transit accessibility is to think of the operation of the taxicab, the most common form of paratransit in U.S. cities. The fare for a taxi is relatively inexpensive for a short trip. The tax fare rises substantially for longer trips. The time and distance traveled simply add to the operating cost of the taxi for long trips, so the fare increases.
>
> The same is rue of paratransit services for the disabled. This is precisely why limits are placed on the operation of paratransit services. If paratransit was open to all disabled persons, to travel any time of the day or evening to any destination n the transit service area, its operating costs would skyrocket. The only cost-effective use of paratransit as a substitute would possibly be for a limited number of short trips. For most transit uses, paratransit is simply too expensive.
>
> For example, in one U.S. city, $4 million was available to provide some form of transit service for the disable.d The city planners estimated that, if a paratransit service was established for weekday trips only, approximately 1200 one-way trips per weekday could be provided. No evening and weekend travel would be allowed, and the $4 million would be exhausted at the end of one year's time.
>
> For the same $4 million, it was estimated by city planners that approximately 250 lifts could be purchases for fixed-route buses. Accessible bus service would be available on about 20 routes, seven days per week, 17 hours per day. And the lift equipment would last as long as the bus--

> about 12 years. A decision was made to purchase the 250 lifts, because for the $4 million outlay, a more lasting and frequent accessible service could be provided.

Paratransit's limitations are pervasive and extreme. In some cities, you must reserve your ride two weeks in advance. In other cities, you must wait several hours for your ride, or you can only go to the doctor, or you must ravel between 9:00 and 5:00 or you're only allowed five rides a month. In many cities a non-disabled friend or family member cannot ride n a paratransit vehicle with a disabled person.

But these limitations are not inevitable. A number of cities, including New York, Denver, Seattle, San Francisco, Johnstown, Tacoma, and Champagne/Urbana, have found that purchasing new buses with lifts, as well as providing supplementary paratransit, is a more effective and non-burdensome approach to providing mass transit to people with disabilities. This is true despite great differences between these cities in size and climate.

Discrimination also occurs in the area of communications, and involves the lack of access to telephone services by people with hearing impairments. Technology is readily available for relay services to be established which connect regular telephone users and hearing-impaired users of telecommunication devices for the deal (know as TDDs). Several states have or are planning to begin such services, and they are often financed by very small (such as ten cent) surcharges on telephone bills. But without a national mandate for such services, the vast majority of deaf Americans are without access to the normal channels of communications in our society which are available only through the telephone.

The Americans with Disabilities Act will go a great distance toward eliminating the various kinds of discrimination I have described in employment, public accommodations, transportation and communications, and in other areas as well. In The ADA is comprehensive and far-reaching, but prudent. In brief, Title I of the bill sets forth findings that too many disabled Americans are victims of discrimination.

Title II prohibits employment discrimination by employers with 15 or more employees. Prohibitions include discrimination in application procedures, hiring and discharge, compensation, advancement, and training. Employers must provide reasonable accommodations for known physical or mental disabilities unless doing so would impose an undue hardship. Qualification standards must be substantially related to an applicant's ability to perform the job in question. Many of these provisions parallel existing non-discrimination rules for employers covered by Section 504 of the Rehabilitation Act of 1973.

Title III of the bill prohibits discrimination in public services by states or political subdivisions of states, and also addresses non-discrimination requirements for public transportation services. The bill would make it illegal to purchase or lease new bus or rail vehicles later than 30 days after enactment, if the vehicles are not accessible to people with disabilities. If a covered entity purchases or leases used vehicles, they must make demonstrated good faith efforts to obtain vehicles that are accessible, and if they remanufacture vehicles such that the vehicle's life is extended for at least five years, the vehicles shall be accessible to the maximum extent feasible.

Paratransit service for elderly and disabled people which is supplementary to fixed route service would have to provide comparable service levels to those provided non-disabled people according to service criteria already promulgated by the Department of Transportation. These include comparable eligibility criteria, response time, fares, hours, and service areas.

For paratransit which provides regular transit service to the general public, such as airport shuttles, newly purchases or leased vehicles must be accessible unless the transit operator can demonstrate that the system, when viewed n its entirety, provides a level of service to disabled people that is equivalent to that provided the general public.

New public transit facilities must be accessible to people with disabilities. In facilities altered later than one year after enactment, the area of alteration must be accessible to the maximum extent feasible, including the path of travel to the altered area and the key facilities (such as restrooms) serving the altered area.

Public transit programs operating in existing facilities must be operated in such a way that, when viewed in their entirety, they are accessible to people with disabilities. In existing rail systems, it shall be considered discriminatory to fail to have at least one car per train that is accessible, as soon as practicable but in no less than five years after enactment. For stations in intercity rail systems, and key stations in rapid rail, commuter rail, and light rail systems, it shall be considered discriminatory if these stations are not accessible as soon as practicable, but in no more than three years after enactment.

An exemption is provided for extraordinarily expensive structural changes to, pr replacement of existing facilities necessary to achieve accessibility, for which the Secretary of Transportation may extend the time limit up to 20 years. In this way, the bill allows for situations in which providing accessibility would be extraordinarily burdensome to public transit authorities.

Title IV of the ADA addresses public accommodations and services operated by private entities. Public accommodations are defined to include auditoriums, convention centers, stadiums, theaters, restaurants, shopping centers, hotels, transportation terminals, passenger vehicle service stations, professional offices of health care providers, office buildings, sales establishments, public services businesses, parks private schools, and recreation facilities.

Discrimination is prohibited by public accommodations against people with disabilities in any of the following ways: the imposition of eligibility criteria that tend to identify or limit the opportunities of disabled people; the failure to make reasonable modifications of rules or procedures if necessary to afford services to disabled (unless such modifications would fundamentally alter the nature of services provided); or the failure to provide auxiliary aids and services necessary to insure a disabled person isn't excluded.

In existing facilities, architectural and communication barriers must be removed when such removal is readily achievable. If removal of barriers is not readily achievable, the covered entity must provide alternative methods of making goods and services available to people with disabilities.

In facilities that are altered later than one year after enactment, alterations must be made in such a manner that the altered area, a path of travel to the altered area, and the key facilities (such as restrooms) serving the altered area must be accessible to the maximum extent feasible.

New facilities constructed later than 30 months after enactment, must be accessible unless it is structurally impracticable.

Private entities providing public transportation services must comply with non-discrimination provisions similar to public entities, in that they may not pose restrictive eligibility criteria, and they must purchase or lease only accessible vehicles.

Title VI of the bill requires that telecommunications relay services, enabling simultaneous communication to take place between individuals using telecommunication devices for the deaf and those using regular telephones, must be provided by common carriers of telephone service, within one year of enactment.

In summary, the Americans with Disabilities Act provides a clear, comprehensive national mandate for the elimination of discrimination against individuals with disabilities. this mandate is urgently needed by our nation's 43 million disabled citizens. I urge your support of its passage.

Prepared Statement of Dr. I. King Jordan

Mr. Chairman and Members of the Subcommittee, I want to thank you for this opportunity to testify in support of the Americans with Disabilities Act of 1989.

My name is I. King Jordan. I am president of Gallaudet University here in Washington. On April 8, 1864--125 years ago--President Abraham Lincoln signed a bill passed by the Congress which established our University, giving deaf people the opportunity to achieve a college education. During the past 125 years, conditions of deaf and other disabled Americans have slowly improved but, I regret to state, we remain today far short of the American dream so eloquently proclaimed by Dr. Martin Luther King.

A little more than one year ago, the Gallaudet protest focused world attention on deaf and other disabled Americans. It instilled in each of us a resolve to see change occur. We disabled Americans know that the time for our civil rights is here. It is long overdue. The time is now, and an Americans with Disabilities Act is a tremendous step in the right direction. For us, there is no turning back.

The Deaf President Now movement at Gallaudet gained worldwide attention, captured the hearts of people throughout the nation and generated more support than we had anticipated in our wildest dreams. As events unfolded at the University, the interest in the appointment of a deaf president became far more than just a Gallaudet issue or even the issue of the presidency. Rather, it became a symbol and an opportunity for deaf persons to achieve a level of self-actualization that heretofore had been denied us. For deaf persons the problem was not so much one of segregation, but one of paternalism and communication isolation. We were not so much relegated to the back of the bus for the last 125 years, but rather, told that we were not capable of becoming its driver. Such an assertion will not be made of us again.

It is my hope that we can build upon this heightened level of sensitivity not only for the benefit of Gallaudet University and for deaf people, but for the benefit of all members of disabled and minority groups everywhere. We should not fail to take full advantage of this opportunity.

During, and following the protest, thousands of Americans sent us messages. Their messages reflected a shocked American public that was surprised, confused and angry to learn that patronizing attitudes and discrimination still exist in this country. We were touched by their understanding and support. One message said that the protest was a "symbol of hope and inspiration to people everywhere." We must convert that "symbol of hope" into action. We cannot let it flicker and die.

I had a vivid example of that hope several months ago. I was in Rhode Island visiting the School for the Deaf and had the opportunity to speak to a class of five-year-olds. I sat in one of their small chairs (my knees folded up to my shoulders!) with the little children sitting on the floor in a semi-circle around me. As I talked with the youngsters, one little fellow got up and came around to my side and put his elbow on my shoulder. I looked at him and he looked at me. I smiled and he smiled. We formed an instant bond. I felt his pride that we had something in common--we were both deaf. I doubt if he knew who I was. But with all the attention I got when I came to the school, he sensed that I was someone important. I sensed that he felt he could be someone important, too, and achieve what he wanted in life. For me that was one of the crowning moments in my first year as president.

I want that little boy to grow up in an America where he can be judged on his individual ability. We must stop sending disabled youth conflicting signals. America makes substantial investments in the education and development of these young people, then we deny them the opportunity to succeed and to graduate into a world that treats them with dignity and respect.

My appointment to the Gallaudet University presidency sends a message to disabled youth everywhere that they, too, can aspire to the heights if they are willing to work hard and prepare themselves for whatever they want to become. I keep reminding the students at Gallaudet and those I meet around the country that they can do it.

I have said, "Deaf People Can do Anything . . . Except Hear." The successful Gallaudet protest showed deaf people that this is true. Deaf people and disabled people now have greater expectations that they can achieve based on their individual ability. But all too often, deaf people and other disabled people are not given an equal chance to show that we are capable.

I want to share with you a conversation I had with a Gallaudet faculty member the night I was named President. He is a deaf man who has deaf parents. With tears in his eyes, he said to me: "There's no way you can ever understand what this means to me personally." And he began to tell about one of his earliest memories of his father, about the pain and frustration his father experienced in the workplace. His father was responsible for hiring people and for training those people. But year after year, time after time, his father would watch with dismay and disbelief as those very people were promoted past him. And always, the company line for holding this young man's father back was that he was deaf -- he couldn't use the telephone, he wouldn't be able to communicate with the people in the company.

In my travels, disabled people have often told me they were denied jobs or promotions because of similar discrimination. Sometimes employers refused to consider them out of fear or ignorance. Many times, little attention is given to how a reasonable, relatively minor and inexpensive accommodation could enable them to do the essential functions of the job.

Discrimination occurs in every facet of our lives. There is not a disabled American alive today who has not experienced some form of discrimination. Of course, this has very serious consequences. It destroys healthy self-concepts and slowly erodes the human spirit. Discrimination does not belong in the lives of disabled people.

A civil rights bill for disabled people would give us the tools to combat this discrimination. It would afford us the protection minorities have had for over 25 years. Most important, a bill such as the ADA must become law to demonstrate that disabled people, like the five-year-old deaf boy I met at the Rhode Island School for the Deaf, can have the same aspirations and dreams as other American citizens. Disabled people must know that their dreams can be fulfilled.

I would like to take a minute to focus on a section of the ADA which is of extreme significance to the deaf community--that portion of the bill requiring telephone relay service for calls made within and between states. A relay system enables deaf callers who use telecommunication devices for the deaf (TDDs) to make calls to and receive calls from individuals using voice telephones.

Over one hundred years ago, Alexander Graham Bell invented the telephone in the hope of closing the communication gap between deaf and hearing people. Not only did the telephone not help, in many ways it widened the gap and has become an additional barrier. I have often received complaints about the frustrations and inconveniences of not being able to use the telephone and, being a deaf person myself, I know well those frustrations. The simplest task often becomes a major burden when we do not have access to the telephone. Take, for example, the person who needs to call the doctor; or the worker who must inform his employer that he or she cannot come to work; or the homeowner who needs to contact a plumber to fix a leak; or the theatergoer who wishes to order tickets and make dinner reservations. These are very simple tasks. They are simple, if you can hear. What should be a five-minute task often becomes a long trip through the city for those of us who do not have access to the telephone.

I know how important the telephone is. It is so important in my work that I have installed a TDD in my car. I may have the only car in the world equipped with a TDD! Yet, I cannot imagine a day without having ready access to my car telephone. With my schedule the way it is, I would be lost without this phone. The phone is a necessity. It is a necessity for all of us, deaf or hearing. Without a relay service, we can call only those other people who own TDDs, a limitation unacceptable to me personally and to deaf people in general.

Last year I testified on the Telecommunications Accessibility Enhancement Act of 1988. That Act set up a relay system within the federal government -- a wonderful first step toward our goal of full telephone access. However, it is just that--only a first step. The ADA will complete the task at hand. By requiring nationwide relay systems, it will help deaf people achieve the level of independence in employment and public accommodations sought by other parts of the ADA.

I believe strongly that the Gallaudet protest brought the entire disabled community together. Today, we are witnessing a cohesiveness that has never before been so strong. Our success at Gallaudet has given all of us a resolve to see this struggle for equal rights through to success. We are confident we will win and we will win together. Forty-three million disabled Americans will not let this opportunity slip by.

Passage of a bill such as the Americans with Disabilities Act will tell disabled Americans that they are indeed equal to other Americans and that discrimination toward disabled persons will no longer be tolerated in our country. It will also make a powerful statement to the world that America is true to its ideals. That is the full measure of the American dream.

Thank you, Mr. Chairman.

TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES

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Appointed by Congressman Major R. Owens, Chairman, House Subcommittee on Select Education

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TESTIMONY PRESENTED BY JUSTIN DART, CHAIRPERSON OF THE TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES, BEFORE THE SENATE SUBCOMMITTEE ON THE HANDICAPPED HEARING ON THE AMERICANS WITH DISABILITIES ACT OF 1989, MAY 9, 1989

MR. CHAIRMAN, IT IS A PRIVILEGE TO APPEAR BEFORE THIS DISTINGUISHED COMMITTEE, WHICH HAS BEEN A STAUNCH SUPPORTER OF AMERICANS WITH DISABILITIES OVER THE YEARS. I BELIEVE THAT I SPEAK FOR ALL OF MY FELLOW MEMBERS OF THE DISABILITY COMMUNITY WHEN I COMMEND YOU FOR YOUR COURAGEOUS PERSONAL LEADERSHIP IN ADVOCATING FOR OUR RIGHTS, INCLUDING THE CIVIL RIGHTS RESTORATION ACT, THE FAIR HOUSING ACT AMENDMENTS, AND NOW THE AMERICANS WITH DISABILITIES ACT. I WOULD ALSO LIKE TO COMMEND SUBCOMMITTEE CHAIRMAN SENATOR HARKIN, AND ALL YOUR DISTINGUISHED COLLEAGUES ON THE COMMITTEE AND THE MEMBERS OF YOUR STAFFS. BOB SILVERSTEIN AND OTHERS HAVE BEEN TOWERS OF STRENGTH FOR JUSTICE.

I SPEAK TODAY AS CHAIRPERSON OF THE TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES, TO GIVE OUR REPORT ON THE MOST IMPORTANT DISABILITY-RELATED LEGISLATION IN THE HISTORY OF THIS NATION, THE AMERICANS WITH DISABILITIES ACT.

AMERICANS WITH DISABILITIES

DISABILITY HAS BECOME A MAJOR FACTOR IN THE LIVES OF ALL THE MEMBERS OF OUR SOCIETY. PRESENTLY THERE ARE AN ESTIMATED 43 MILLION AMERICANS WITH DISABILITIES. THIS FIGURE IS INCREASING RAPIDLY AS MODERN MEDICAL SCIENCE ENABLES MORE AND MORE PEOPLE TO SURVIVE PREVIOUSLY FATAL BIRTH DEFECTS, INJURIES AND ILLNESSES AND TO LIVE MANY POTENTIALLY PRODUCTIVE AND HAPPY YEARS WITH SIGNIFICANT DISABILITIES. THESE DISABILITIES RESULT FROM NUMEROUS PHYSICAL AND MENTAL CONDITIONS, INCLUDING THE NORMAL PROCESS OF AGING AND IMPAIRMENTS OF VISION, SPEECH, HEARING, LEARNING, INTELLECTUAL FUNCTION AND MOBILITY. ALTHOUGH NOT ALL CHRONIC ILLNESS IS DISABLING, MUCH DISABILITY IS A CONSEQUENCE OF DISEASES OF THE CIRCULATORY, RESPIRATORY, URINARY, NEUROLOGICAL, SKELETAL, MUSCULAR, GLANDULAR, DERMATOLOGICAL, AND DIGESTIVE SYSTEMS; OF ARTHRITIS, CEREBRAL PALSY, EPILEPSY, DIABETES, MENTAL ILLNESS, CANCER, TRAUMATIC BRAIN INJURY, MULTIPLE SCLEROSIS, MUSCULAR DYSTROPHY, AIDS, AUTISM, ALLERGIES, AND MANY OTHER DISORDERS. SOME RESEARCHERS ESTIMATE THAT THE

PROPORTION OF OUR POPULATION WITH DISABILITIES, NOW MORE THAN 15%, WILL DOUBLE WITHIN THE NEXT 30-50 YEARS. IT IS HIGHLY PROBABLE THAT ANY PERSON BORN IN 1989 WILL EXPERIENCE AT LEAST TEMPORARY DISABILITY DURING HIS OR HER LIFETIME. IT IS VIRTUALLY CERTAIN THAT ONE OR MORE MEMBERS OF ALMOST EVERY AMERICAN FAMILY WILL BECOME DISABLED.

ALTHOUGH THIS DRAMATIC INCREASE IN THE LIFE SPAN REPRESENTS AN HISTORIC ENLARGEMENT OF THE HUMAN POTENTIAL, OUR CULTURE HAS NOT YET MODIFIED ITS PRACTICES TO FULFILL THAT POTENTIAL, OR EVEN TO MEET THE BASIC LIFE SUPPORT REQUIREMENTS CREATED BY THE NEW CHARACTERISTICS OF ITS MEMBERS. MAJOR PROBLEMS HAVE DEVELOPED.

THE TASK FORCE

IN THIS CONTEXT, THE TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES WAS ESTABLISHED ON MAY 2, 1988, BY CONGRESSMAN MAJOR R. OWENS, CHAIRMAN OF THE HOUSE SUBCOMMITTEE ON SELECT EDUCATION. COMPOSED OF 34 DISTINGUISHED REPRESENTATIVES OF MAJOR SEGMENTS OF THE DISABILITY COMMUNITY, THE TASK FORCE IS MANDATED TO COLLECT INFORMATION AND TO MAKE RECOMMENDATIONS WHICH WILL ASSIST CONGRESS AS IT CONSIDERS THE HISTORIC AMERICANS WITH DISABILITIES ACT, AND OTHER LEGISLATION DESIGNED TO IMPLEMENT THE RIGHTS OF AMERICA'S CITIZENS WITH DISABILITIES.

THE TASK FORCE WISHES TO ACKNOWLEDGE THE MAGNIFICENT SUPPORT IT HAS RECEIVED FROM NUMEROUS MEMBERS OF CONGRESS, PARTICULARLY TASK FORCE FOUNDER CONGRESSMAN MAJOR OWENS AND THE MEMBERS OF THE HOUSE SUBCOMMITTEE ON SELECT EDUCATION, SENATORS TOM HARKIN AND LOWELL WEICKER AND THE MEMBERS OF THE SENATE SUBCOMMITTEE ON THE HANDICAPPED, AND ALL THE SPONSORS OF THE CIVIL RIGHTS RESTORATION ACT, THE FAIR HOUSING ACT AMENDMENTS OF 1988, THE TECHNOLOGY-RELATED ASSISTANCE FOR INDIVIDUALS WITH DISABILITIES ACT AND THE AMERICANS WITH DISABILITIES ACT.

THE TASK FORCE HAS NO PUBLIC FUNDING OR PRIVATE GRANTS. PARTICULAR RECOGNITION IS DUE TASK FORCE MEMBERS, STAFF AND VOLUNTEERS, AND THE LITERALLY THOUSANDS OF PATRIOTIC CITIZENS AND ORGANIZATIONS IN EVERY STATE AND TERRITORY WHO HAVE CONTRIBUTED SERVICES, MONEY AND TIME TO MAKE THE DEMOCRATIC SYSTEM WORK.

FINDINGS

THE MEMBERS OF THE TASK FORCE, THE ORGANIZATIONS WITH WHICH THEY ARE AFFILIATED AND MORE THAN 8,000 PERSONS WITH DISABILITIES, FAMILIES, ADVOCATES AND SERVICE PROVIDERS ATTENDING 63 TASK FORCE FORUMS IN 50 STATES AND TWO CONGRESSIONAL HEARINGS HAVE PRODUCED OVERWHELMING VERBAL AND WRITTEN EVIDENCE THAT:

SO LONG CONSTANTLY REACHING DEAD ENDS. I'M BROKE, DEGRADED AND ANGRY. HAVE ATTEMPTED SUICIDE THREE TIMES. I KNOW HUNDREDS. MOST OF US TRIED, BUT WHICH WAY AND WHERE DO WE GO? WHERE CAN WE LIVE? WHAT AND WHO CAN WE BE? IF I WERE UNDERSTOOD, CARED FOR, EDUCATED FOR A NEW LIFE AND CAREER, I WOULD HAVE SOMETHING TO LIVE FOR.

WHO HAS THE DEPTH, DETERMINATION, INTUITION, PLAN TO HELP US?"

- ON DECEMBER 28, 1988, IN TACOMA, WASHINGTON, TWO YEAR OLD DYLAN DAY AND HIS GRANDFATHER HOLLIS DAY WERE FOUND SHOT TO DEATH, AN APPARENT MURDER-SUICIDE. ACCORDING TO THE CHILD'S MOTHER, HER FATHER HAD BEEN "VERY, VERY CONCERNED ABOUT MY CHILD'S CONDITION." DYLAN HAD "A MILD FORM OF CEREBRAL PALSY, AND WAS CONSIDERED TO BE DEVELOPMENTALLY DISABLED." MR. DAY, A RETIRED COMPANY PRESIDENT, COULD NOT BEAR THE THOUGHT THAT HIS DAUGHTER AND GRANDSON WOULD HAVE TO FACE THE DEVASTATING LIFETIME OF DISCRIMINATION AND DEPRIVATION THAT HE FORESAW FOR THEM.

- A WOMAN IN CALIFORNIA WHO IS BLIND WROTE TO THE TASK FORCE: "I AM A TRAINED NEWS REPORTER AND HAVE BEEN APPLYING FOR JOBS AT RADIO STATIONS THROUGHOUT THE COUNTRY. I HAVE BEEN REPEATEDLY TOLD THAT I AM THE MOST QUALIFIED CANDIDATE, BUT SINCE THERE HAS NEVER BEEN A BLIND REPORTER BEFORE, THEY CANNOT HIRE ME. I WOULD LIKE THE CHANCE TO SUCCEED OR FAIL BASED ON MY ABILITY AS A REPORTER RATHER THAN MY LACK OF VISION."

- A SERVICE PROVIDER TO HEARING IMPAIRED PEOPLE IN ILLINOIS TESTIFIED: "WE HAVE CLIENTS WHO ARE ADMITTED TO HOSPITALS, UNDERGO SURGERY, AND ARE RELEASED WITHOUT THE BENEFIT OF A SIGN LANGUAGE INTERPRETER TO RECEIVE INFORMATION CRITICAL TO THEIR HEALTH. WE HAVE CLIENTS WHO HAVE BEEN ARRESTED AND HELD IN JAIL OVER NIGHT WITHOUT EVER KNOWING THEIR RIGHTS NOR WHAT THEY ARE BEING HELD FOR. WE HAVE CLIENTS WHOSE CHILDREN HAVE BEEN TAKEN AWAY FROM THEM AND TOLD TO GET PARENT INFORMATION, BUT HAVE NO PLACE TO GO BECAUSE THE SERVICES ARE NOT ACCESSIBLE. WHAT CHANCE DO THEY EVER HAVE TO GET THEIR CHILDREN BACK?"

223 YEARS AFTER OUR FOUNDING FATHERS DECLARED THAT ALL MEN "ARE ENDOWED BY THEIR CREATOR WITH CERTAIN UNALIENABLE RIGHTS," 25 YEARS AFTER THE CIVIL RIGHTS ACT OF 1964, AMERICANS WITH DISABILITIES STILL DO NOT ENJOY THE COMPREHENSIVE PROTECTION AGAINST DISCRIMINATION WHICH HAVE BEEN PROVIDED TO ALL OTHER MAJOR MINORITIES. EXISTING LAWS PROVIDING FOR PARTIAL RIGHTS ARE VERY POORLY IMPLEMENTED AND ENFORCED.

THE TASK FORCE CONCLUDES THAT:

DISABILITY HAS BECOME A NORMAL CHARACTERISTIC OF HUMAN EXPERIENCE. MOST PEOPLE WITH DISABILITIES HAVE THE POTENTIAL TO BECOME FULLY PRODUCTIVE PARTICIPANTS IN THE MAINSTREAM OF SOCIETY. VIRTUALLY ALL PEOPLE WITH DISABILITIES HAVE THE POTENTIAL TO BECOME MORE SELF-RELIANT, AND TO CONTRIBUTE TO THE PRODUCTIVITY AND QUALITY OF LIFE OF THOSE AROUND THEM. HOWEVER THIS VAST HUMAN POTENTIAL IS BEING SEVERELY SUPPRESSED BY TRADITIONAL DISCRIMINATION, RESULTING IN UNCONSCIONABLE INJUSTICE TO INDIVIDUALS, AND UNAFFORDABLE ECONOMIC AND MORAL BURDENS FOR THE NATION.

AMERICANS WITH DISABILITIES WILL NEVER BE ABLE TO FULFILL THEIR POTENTIAL TO BECOME FULLY CONTRIBUTING, PRODUCTIVE CITIZENS OF THE FIRST CLASS UNTIL THIS NATION EMPOWERS THEM BY TAKING DECISIVE ACTION TO ELIMINATE DISCRIMINATORY PRACTICES AND THE FALSE ASSUMPTIONS ON WHICH THOSE PRACTICES ARE BASED. HISTORY DEMONSTRATES THAT THIS CAN ONLY BE DONE THROUGH A FIRM, ENFORCEABLE STATEMENT OF LAW THAT PEOPLE WITH DISABILITIES HAVE THE SAME INALIENABLE RIGHTS AS OTHER PEOPLE, AND THAT HENCEFORTH THEY ARE TO BE ACCORDED EQUAL OPPORTUNITY IN ALL ASPECTS OF LIFE.

THE TASK FORCE URGES:

- THAT CONGRESS TAKE PROMPT ACTION TO CONSIDER AND TO PASS THE AMERICANS WITH DISABILITIES ACT OF 1989, WITH VIGILANCE THAT THE PRINCIPLE OF EQUALITY NOT BE COMPROMISED. THE FINAL PRODUCT OF THE LEGISLATIVE PROCESS MUST ENSURE THE PROTECTION AND ENFORCEMENT OF THE CIVIL RIGHTS OF ALL PEOPLE WITH DISABILITIES TO PARTICIPATE FULLY AND EQUALLY IN THE MAINSTREAM OF SOCIETY.

- THAT THE PRESIDENT AND THE EXECUTIVE BRANCH PROVIDE VIGOROUS PUBLIC AND ADMINISTRATIVE LEADERSHIP ON BEHALF OF THE PASSAGE AND THE IMPLEMENTATION OF THE AMERICANS WITH DISABILITIES ACT.

- THAT ALL CITIZENS WHO LOVE JUSTICE ADVOCATE FOR THE ENACTMENT OF THE AMERICANS WITH DISABILITIES ACT, AND TAKE DECISIVE ACTION TO MAKE THE RIGHTS WHICH ADA MANDATES REAL IN THEIR HOMES AND COMMUNITIES.

SUPPORT AND CONCERNS

THE AMERICANS WITH DISABILITIES ACT HAS BEEN ENDORSED SPECIFICALLY OR IN PRINCIPLE BY THE LEADERS OF BOTH MAJOR POLITICAL PARTIES: PRESIDENT BUSH, VICE PRESIDENT QUAYLE AND GOVERNOR DUKAKIS; AND BY MORE THAN ONE HUNDRED AND FIFTY DISTINGUISHED MEMBERS OF THE LAST CONGRESS. IT HAS BEEN ENDORSED BY INDIVIDUALS AND ORGANIZATIONS REPRESENTING EVERY MAJOR SEGMENT OF THE DISABILITY COMMUNITY. OF THE LITERALLY THOUSANDS OF

BUT WON'T ADA REQUIRE MASSIVE EXPENDITURES BY GOVERNMENT AND THE PRIVATE SECTOR? HOW CAN WE AFFORD SUCH EXPENDITURES NOW, IN A TIME OF PROPOSED BUDGET CUTS BY GOVERNMENT, AND INCREASING COSTS FOR BUSINESS AND INDIVIDUALS?

EQUALITY DOES REQUIRE A RECOGNITION OF COMPETING EQUITIES AND A BALANCING OF INTERESTS. ADA HAS BEEN WRITTEN ON PRINCIPLES OF FAIRNESS TO THE ADVANTAGED AS WELL AS TO THE DISADVANTAGED.

WHILE IT IS TRUE THAT EQUAL OPPORTUNITY FOR PEOPLE WITH DISABILITIES WILL REQUIRE CERTAIN INITIAL COSTS, INCREASED GOVERNMENT SPENDING TO IMPLEMENT ADA WILL BE MINIMAL, LIMITED PRINCIPALLY TO ENFORCEMENT ENTITIES WHICH ALREADY EXIST. THE PRIVATE SECTOR WILL NOT BE REQUIRED TO SPEND ENORMOUS SUMS ON INSTANT TOTAL RENOVATIONS OF EXISTING FACILITIES, BUT RATHER TO MAKE REASONABLE EFFORTS TO MAKE SUCH FACILITIES ACCESSIBLE, AND TO ACCOMMODATE EMPLOYEES WITH DISABILITIES. MAJOR EMPHASIS IS GIVEN TO CREATING NEW FACILITIES AND SYSTEMS THAT WILL BE COMPLETELY ACCESSIBLE. WITH APPROPRIATE PLANNING, THIS WILL, IN MOST CASES, REQUIRE ONLY MODESTLY INCREASED INVESTMENTS SPREAD OVER A REASONABLE PERIOD OF TIME.

WHAT WILL BE NECESSARY IS NOT GREAT INCREASES IN SPENDING, BUT RATHER CREATIVE, COURAGEOUS ACTION TO CHANGE TRADITIONAL PRACTICES, AND TO REALLOCATE PUBLIC AND PRIVATE RESOURCES FROM PROCESSES THAT FORCE SEGREGATION AND DEPENDENCE TO PROCESSES THAT PRODUCE PRODUCTIVE INVOLVEMENT IN THE MAINSTREAM OF SOCIETY.

JUST AS THE PREVENTION OF DRUG ABUSE COSTS LESS IN THE LONG RUN THAN ITS CURE, SO WILL THE PREVENTION OF THE DEPENDENCY OF PEOPLE WITH DISABILITIES COST LESS THAN THE PUBLIC AND PRIVATE COSTS OF ITS CONSEQUENCES.

THE PAYMENTS AND REALLOCATIONS REQUIRED BY ADA WILL NOT BE OVERHEAD COSTS, BUT WILL CONSTITUTE THE TYPE OF INVESTMENTS THAT HAVE ALREADY PROVEN TO BE PROFITABLE TO EVERY CITIZEN, AND TO THE NATION AS A WHOLE.

THE APPROPRIATE QUESTION IN REGARD TO THE ECONOMIC IMPACT OF ADA IS NOT "HOW MUCH WILL IT COST?," OR EVEN "HOW MUCH WILL IT SAVE?," BUT RATHER, "HOW MUCH WILL IT PROFIT THE NATION IN THE LONG RUN?" THE PROBABLE ANSWER IS, "HUNDREDS OF BILLIONS."

DOES ADA INITIATE AN AGENDA WHEREBY PEOPLE WITH DISABILITIES WILL BE ENTITLED TO GOVERNMENT SOLUTIONS FOR ALL THEIR PROBLEMS?

CERTAINLY NOT. THAT IS NOT ONLY UNDESIRABLE, IT IS IMPOSSIBLE. PROBLEMS ARE SOLVED BY THE CITIZENS THEMSELVES, OR THEY ARE NOT

PEOPLE WITH DISABILITIES, THEIR FAMILIES, SERVICE PROVIDERS AND ADVOCATES PRESENTING EVIDENCE TO THE TASK FORCE, NOT ONE INDIVIDUAL EXPRESSED OPPOSITION TO ADA.

HOWEVER CONCERNS HAVE BEEN EXPRESSED BY PERSONS AND GROUPS UNFAMILIAR WITH OUR PROBLEMS AND POTENTIAL, WHO FEAR THAT PROVISIONS OF ADA MIGHT NEGATIVELY IMPACT THEIR INTERESTS.

THE TASK FORCE BELIEVES THAT THE MAJORITY OF THESE CONCERNS, ALTHOUGH SINCERELY HELD AND WELL MEANING, ARE BASED LARGELY ON TRADITIONAL ASSUMPTIONS AND LACK OF INFORMATION.

MOST OFTEN EXPRESSED IS CONCERN ABOUT THE COST OF IMPLEMENTING ADA. DOES ADA IMPOSE UNAFFORDABLE ECONOMIC BURDENS ON THE NATION?

EQUALITY UNAFFORDABLE IN AMERICA? WOULD THIS QUESTION BE ASKED ABOUT BLACK, HISPANIC OR JEWISH PEOPLE? THE VERY EXISTENCE OF THE QUESTION REVEALS THE EXTENT TO WHICH ANCIENT ASSUMPTIONS ABOUT DISABILITY HAVE BEEN INTERNALIZED. THE VERY QUESTION IS INCONSISTENT WITH THE PRINCIPLES SET OUT IN THE DECLARATION OF INDEPENDENCE, THE CONSTITUTION AND THE PLEDGE OF ALLEGIANCE TO THE FLAG. THE VERY QUESTION DEMONSTRATES DRAMATICALLY THE ABSOLUTE NECESSITY FOR A NATIONAL MANDATE OF EQUALITY.

NOT SINCE THE ABOLITION OF SLAVERY HAVE AMERICANS BEEN DENIED EQUALITY FOR ECONOMIC REASONS. THE PRINCIPLE OF EQUALITY IS NOT NEGOTIABLE IN THE UNITED STATES OF AMERICA.

ADA IS NOT ONLY AFFORDABLE, WE CANNOT AFFORD NOT TO HAVE IT.

IT IS THE STATUS QUO THAT IS UNAFFORDABLE. IT IS THE OBSOLETE STATUS QUO PRACTICES OF DISCRIMINATION AND SEGREGATION THAT ARE PREVENTING PERSONS WITH DISABILITIES FROM BEING PRODUCTIVE, AND ARE DRIVING US INEVITABLY TOWARD THE ECONOMIC AND MORAL DISASTERS OF GIANT PATERNALISTIC WELFARE BUREAUCRACIES. WE ARE ALREADY PAYING UNAFFORDABLE BILLIONS IN PUBLIC AND PRIVATE FUNDS TO MAINTAIN MILLIONS OF POTENTIALLY PRODUCTIVE AMERICANS IN UNJUST, UNWANTED WELFARE DEPENDENCY. FEDERAL, STATE AND LOCAL GOVERNMENTS ARE ESTIMATED TO SPEND WELL OVER $100 BILLION ANNUALLY. EXPENDITURES BY PRIVATE INDIVIDUALS AND ORGANIZATIONS AND LOST TAXES AND PRODUCTIVITY, PROBABLY TOTAL AT LEAST ANOTHER 200 BILLION. THOUSANDS OF FAMILIES ARE BANKRUPTED ANNUALLY. AND THESE MASSIVE COSTS ARE ESCALATING EXPLOSIVELY WITH THE RAPIDLY INCREASING POPULATION OF CITIZENS, ESPECIALLY ELDERLY PERSONS, WITH SIGNIFICANT PHYSICAL AND MENTAL IMPAIRMENTS.

SOLVED AT ALL. INDEED, RESPONSIBILITY FOR IMPLEMENTING ADA ON A DAY-TO-DAY BASIS WOULD LIE PRINCIPALLY WITH THE PRIVATE SECTOR. BUT GOVERNMENT IS INESCAPABLY RESPONSIBLE TO PROVIDE LEADERSHIP WHICH RESULTS IN CITIZEN SOLUTIONS. ADA AUTHORIZES GOVERNMENT AT SEVERAL LEVELS TO PROVIDE THAT LEADERSHIP TO END DISCRIMINATION.

WILL ADA REQUIRE EMPLOYERS TO EMPLOY UNQUALIFIED PEOPLE?

ADA SPECIFICALLY STATES THAT EMPLOYERS WILL NOT BE REQUIRED TO EMPLOY UNQUALIFIED PERSONS. HOWEVER THEY WOULD BE REQUIRED TO MAKE REASONABLE ACCOMMODATIONS FOR QUALIFIED CANDIDATES WITH DISABILITIES.

SUMMARY.

EVER INCREASING MILLIONS OF AMERICANS WITH DISABILITIES SUFFER MASSIVE DISCRIMINATION IN ALL ASPECTS OF SOCIAL PROCESS WHICH CONDEMNS THEM TO LIFETIMES OF SEGREGATION, POVERTY AND UNPRODUCTIVE DEPENDENCY ON PUBLIC AND PRIVATE WELFARE. THIS IS MORALLY INTOLERABLE AND ECONOMICALLY DISASTROUS.

ADA WILL NOT SOLVE ALL OF THE PROBLEMS OF AMERICANS WITH DISABILITIES, BUT IT IS AN ESSENTIAL FOUNDATION FOR ALL OPTIMAL SOLUTIONS. BECAUSE UNTIL WE ELIMINATE THE INSIDIOUS ASSUMPTION THAT PEOPLE WITH DISABILITIES ARE LESS THAN FULLY HUMAN, AND ESTABLISH THE CONCEPT AND PRACTICE OF THEIR EQUALITY, THERE WILL BE NO MORE THAN TOKEN ACTION TO ENABLE THEM TO PARTICIPATE FULLY IN THE PRODUCTIVE MAINSTREAM OF SOCIETY.

THE ECONOMIC AND MORAL GREATNESS OF AMERICA IS BASED ON A HISTORY OF EXTENDING EQUAL OPPORTUNITY TO WAVE AFTER WAVE OF PREVIOUSLY OPPRESSED AND DEPENDENT GROUPS. PROVIDING SUCH OPPORTUNITY TO AMERICANS WITH DISABILITIES WILL RESULT IN YET ANOTHER PERIOD OF DYNAMIC GROWTH IN THE PRODUCTIVITY, PROSPERITY AND QUALITY OF LIFE OF THE NATION. IT WILL REINFORCE AMERICA'S TRADITIONAL LEADERSHIP FOR DEMOCRACY AND HUMAN RIGHTS THROUGHOUT THE WORLD.

THE TASK FORCE URGES ALL WHO BELIEVE IN THE DREAM OF LIBERTY AND JUSTICE FOR ALL TO UNITE IN SUPPORT OF THE IMMEDIATE ENACTMENT AND THE VIGOROUS IMPLEMENTATION OF THE AMERICANS WITH DISABILITIES ACT.

Justin Dart Chairperson	Dr. Elizabeth Boggs Co-chairperson	Lex Frieden Coordinator

Prepared Statement of Mary DeSapio

My name is Mary DeSapio. I would like to thank you for this opportunity to testify. I am a cancer survivor. During my lifetime I have never experienced a more difficult and challenging road to recovery. My journey was fraught with a new reality: discrimination. Cancer survivors are discriminated against by the outside world in both the private and public sectors. I represent over five million Americans with a history of cancer. My story is not unique. Unfortunately many cancer survivors have had experiences that are similar to mine.

My background encompasses an extensive and diversified experience as a financial analyst. I am a member of the Financial Analysts Federation and the New York Society of Security Analysts, as well as many other professional societies. I have established a solid reputation as a financial analyst, with extensive experience in the transportation area. My experience as a financial planner has included senior positions with major investment banking and brokerage firms, including Shearson Lehman Brothers, Inc., Lehman Brother Kuhn Loeb and Carl Marks. I have also served as a financial consultant to the Department of Transportation and appeared as an expert witness on its behalf.

I became employed on a full-time basis as Vice President in charge of transportation by Josephthal and Company, Inc. on March 11, 1987. On January 29, 1988, I was diagnosed as having breast cancer. I immediately informed my superiors at Josephthal. On February 1st, I was hospitalized for treatment, a lumpectomy and auxilliary nodes were excised. My superiors knew that my recovery would take about a month. During my recuperation I would report daily by phone, even while I was in the hospital, to advise my clients as to market strategy. After I returned home, I often dropped by the office to pick up mail and work on any urgent matters.

One month later, on March 1st, I returned to Josephthal, ready to resume my life and my employment on a full-time basis. I scheduled my radiation treatments at the earliest possible time in the morning so that they would not interfere with my daily work schedule. My superiors were aware of this treatment schedule. Immediately upon my return I was asked to attend a meeting with the Director of Research and the Senior Vice President. At that meeting I was told that I was terminated, effective immediately. They told me that I was no longer needed.

Josephthal had consistently recognized my expertise and my job performance rating had been outstanding throughout my employment. Together with all other employees, in January, 1988, I had agreed to a 10% cut in salary in order to insure my position. This policy was announced to the Josepthal staff and we received a confirmation notice on February 19, along with our paychecks, which included the salary cut. After the October '87 crash, many Wall Street firms utlized this policy. However this notice said that I would have a job. Despite this agreement, they fired me.

I was shocked. It's hard enough to go through the trauma of cancer, but losing my job, I wasn't ready for that. I was the same person. I had the same skills I had prior to my surgery. I tried to seek full-time employment with other Wall Street firms but, because Wall Street is a close community, everyone was aware of the circumstances of my termination. Words cannot describe the emotional and mental distress I have experienced. I have also sustained tremendous economic loss, including lost income, lost benefits and career loss. Potential employers see me not only as a cancer survivor but also a woman who has seen many decades. This makes resuming my career much more difficult.

I feel like I have been unfairly branded for life. Cancer does not discriminate. What happened to me could happen to anyone, in any profession, at any time. Much to my astonishment, all of my expertise was not an effective shield against discrimination.

I, like millions of my fellow cancer survivors, am not famous like Betty Ford. In order to protect cancer survivors against humiliating experiences like mine, we need a federal law to prohibit employment discrimination in the private sector. The Americans with Disabilities Act of 1989 will give us an opportunity to fight for equality.

TESTIMONY OF JOSEPH F. DANOWSKY
BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
REGARDING THE AMERICANS WITH DISABILITIES ACT OF 1989 (ADA)
MAY 9, 1989

I am giving this testimony in support of the Americans with Disabilities Act of 1989 (ADA), the aim of which is to prohibit employment discrimination against the disabled. This statement serves to illustrate my own job search difficulties as a visually disabled person and summarizes how I feel this bill may alleviate some of these problems for other disabled persons.

I first should explain that I have been legally blind since birth. This disability prevents me from, among other things, reading printed material, recognizing faces, and reading street signs. No vision aid or magnification devices are of any help to me.

I undertook my college and professional school education with the assistance of readers and recorded books. In 1980, I graduated from the University of Pennsylvania with a B.A. degree in Economics, summa cum laude, and as a member of Phi Beta Kappa. I then entered Harvard Law School and in 1983, with a B average, graduated with a J.D. degree.

While at Harvard Law School, I knew six other blind students, all of whom had extremely frustrating experiences in seeking employment. When I first arrived at Harvard, blind upperclassmen told me that I would never get a job in a private law firm and that I should resign myself to the fact that only government positions would be available to me. They told me that, in their collective recent memory, no blind Harvard Law School graduates had been able to secure positions with law firms. Positions with law firms are the most common summer and post-graduate employment positions obtained by sighted Harvard Law School students.

Nonetheless, during my first year of law school, I persevered in attempting to obtain a summer position with a law firm. I applied to well in excess of 100 law firms throughout the country. To the amazement of my blind peers, I obtained employment with one law firm--a large firm in Pittsburgh, Pennsylvania--which provided me with a reading assistant. As a result of my work there as a summer associate, I received an offer from that firm for full-time employment as an associate upon graduation.

In fairness, I must note that all first-year students, blind or not, have more difficulty finding summer employment than do upperclassmen, because Harvard's full job-placement services are not available to first-year students. However, the degree of difficulty my sighted classmates had was simply not comparable to mine.

The second-year interviewing season at Harvard Law School provided quite a different experience for the average student. Over 900 law firms conducted on-campus interviews. I knew of no sighted law student who did not, from the on-campus interviews, have numerous offers from several law firms in the cities of his or her choice. However, my second-year experience and that of my blind peers was quite different. Personally, I spent almost every class day from the beginning of October through the first week in December attending interviews, any and all that I could fit into my schedule. I interviewed with firms from almost every major city in the United States. In the end, I received only two job offers and accepted a summer position with a major firm in Philadelphia, Pennsylvania, from which I received an offer for full-time employment after graduation and for which I worked for three years subsequent to graduation. The firm provided me with a reading assistant.

I ultimately decided to seek a job in a corporate legal department. From previous experience, I knew that a job search would be particularly difficult for me. I knew that I did not have a choice of cities, but would have to embark on a nationwide campaign. I did so beginning in 1985, at which time I was a member of two state bars. This search included responding to newspaper advertisements and contacting placement agencies. I quickly learned that most placement agencies were unwilling to work with me once they learned of my visual disability, since they desired to place persons as quickly and easily as possible. I therefore concentrated my efforts solely on advertisements and direct, unsolicited inquiries by letter.

It is significant to note that the resume accompanying my letters prominently noted an award I had received from Recording for the Blind, Inc., as one of three outstanding blind college graduates in the country in 1980. I chose to note this award on my resume not only because I was proud of it, but also as a way of making clear to potential employers that I did have a visual disability. I believed, and still believe, that the best way for a disabled person to deal with possible employment problems relating to his disability is to confront the issue directly.

Over the summer of 1985, I wrote directly, i.e., by name, to those in the position of General Counsel at every Fortune 500 company and at over 100 additional companies. I wrote follow up letters to the same individuals twice, in the fall and in late winter.

As a result of this job campaign, I received approximately 20 telephone responses from companies throughout the United States. Only two or three of these potential employers realized, before our conversation, that I had a visual impairment. Most apparently missed the reference to my disability on my resume. However, once learning of my disability during our initial telephone conversations, several of these employers immediately withdrew their invitations for me to visit their offices, and most others became noticeably uncomfortable in tone and manner.

The end result of this campaign--of writing to 600 companies three times in the course of a year and of having 14 interviews--was that I did not receive one job offer.

From my conversations and the interviews that I did have, I surmised several reasons why these corporate law departments were unwilling to hire a blind attorney. These employers seemed to believe that a blind person could not handle legal work, work so heavily dependent upon reading and writing. In addition, hiring attorneys seemingly did not want to take what their superiors might perceive as a "risk" in hiring a blind individual. And perhaps most significantly, they did not want to bear the expense of hiring a reading assistant. Apparently, the fact that I had excellent credentials and references from two successful employment experiences was not enough to overcome their misconceptions and concerns.

Such prejudice seemed likely to bar my ever obtaining employment with a corporation. By April of 1986, I felt left with no choice but to take a new approach to my job search, an admittedly aggressive and ambitious approach. I then wrote directly to the chief executive officers of almost every Fortune 500 company. I described my qualifications and the difficulty that I, as a blind lawyer, was having in seeking employment. I highlighted the general unwillingness on the part of corporate law departments to hire blind individuals for responsible positions.

My purpose in appealing directly to the chief executive officers, who were ultimately responsible for hiring policies throughout their corporations, was to make them aware of the reluctance on the part of their managers to hire disabled persons. I hoped that the chief executive officers would make it known to their managers that hiring disabled persons was not something to be avoided and that the unusual expenses associated with accommodating a disabled person's employment should not be the determinative factor in a hiring decision. As a result of my appeal, I received numerous invitations for interviews, some from the very same companies that, only a few weeks earlier, had written to me and said no positions were available.

One of the companies that offered me an interview was my current employer, the New York securities firm of Bear Stearns & Company, Inc. I would like to point out that, as Bear Stearns had just become a public company, it was not among the 600 companies to whom I had written in 1985.

I currently practice in a legal department of fifteen attorneys. My work consists of, among other things, advising brokers and operations personnel on various aspects of securities regulation, and drafting and negotiating various agreements relating to the brokerage business and general corporate law matters. I do my work with the assistance of a reader provided by the firm.

The proposed bill, I believe, will help ameliorate discrimination in the job market such as that which I experienced. Were such legislation passed, a strong signal would be sent to the private sector that discrimination against disabled persons is just as wrong as discrimination against any other minority group. Moreover, as such legislation would require companies to put in place definite policies with respect to hiring the disabled, it would enable hiring personnel to be more comfortable about their decisions to hire the disabled, whereas now hiring personnel seem to feel they are stepping outside the corporate mainstream--and thereby jeopardizing their own positions--by hiring a disabled individual. In addition, the aspect of the bill requiring employers to make reasonable accommodations would encourage employers to think of and create ways to make an employment relationship with a disabled person succeed, whereas, in the absence of such legislation, employers seem more inclined to find reasons as to why such a relationship would not succeed.

Respectfully submitted,

Joseph F. Danowsky

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Prepared Statement of Amy Dimsdale

My name is Amy Dimsdale. I live in Arlington, Texas and am 28 years old. I'm here to tell you my personal story of employment discrimination, which happened not just once but time after time after time, because of my disability.

I graduated five years ago from the University of Texas at Arlington with a degree in Journalism and have diligently sought employment since my graduation. However, the doors of opportunity never opened for me, and I have yet to be seriously considered for a job.

All my life I was told I need a college degree to get a job, so I got a degree. Then, potential employers told me I needed experience, so I spent several years doing double duty, looking for jobs and also volunteering time to keep my skills current: writing and fundraising for a number of organizations and causes. Tirelessly, I continued applying for jobs, attending job fairs, reading newspaper ads, following every lead and utilizing every network I could think of.

Over time, a pattern established itself. Employer after employer told me that I have outstanding qualifications, but they found someone better suited for the position. Again and again and again.

After being dismissed without serious scrutiny time after time, it began to dawn on me that maybe it wasn't something deficient in my skills and experience that caused this treatment. The understanding grew in me that I was not being considered seriously for employment because I use a wheelchair.

I submitted over three hundred resumes and more than one hundred applications. I've indicated my willingness to be flexible, work at home, relocate, and use my own special equipment, all to no avail. I need virtually no special accommodations to work, as long as I can get in the building. But the stigma about disability is so strong in our society that my potential employers ignored me.

Frustrated by my lack of success, I made sure the last group of letters stressed the Targeted Jobs Tax Credit, hoping that companies would seize an opportunity to save money by hiring an energetic, qualified employee. But again, the response was dismal: I received one reply from seventeen tries with the usual, lame explanation that I am well-qualified and experienced, but they found someone better suited for the position.

I earnestly want to work. In preparation for my adulthood, the government invested considerable resources in me so that I could land a job. My college expenses were paid. I received services through the Texas Rehabilitation Commission. I now receive Supplemental Security Income, food stamps, Medicaid and Medicare benefits. Section 504 of the Rehabilitation Act of 1973 was implemented, partially so I could go to college at an accessible campus and receive services that gave me an equal shot at gaining an education. But still, the door of opportunity slams shut in my face, because of the final, so-far-insurmountable barrier: the attitudes of employers who are under no mandate whatsoever to consider me fairly.

I feel useless, powerless, and demeaned. I feel that all my energy has gone into a black hole. And I know I'm not alone; most of my friends with handicaps experience the same exhausting process. It is enough to make someone give up and accept life-long dependency on benefits instead of productive work. I know many educated, capable, and intelligent disabled people who have given up in this way.

Discrimination hurts not only those people with disabilities whose potentially productive lives go wasted, but the rest of society as well, because everyone pays the price for economic dependency.

I want to work, like millions of my fellow disabled Americans want to work. I'm not asking for charity; I'm just asking for opportunity.

Thank you for listening to my story.

Prepared Statement of Harold Russell

MR. CHAIRMAN, MY NAME IS HAROLD RUSSELL. I AM THE CHAIRMAN OF THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES. I WAS APPOINTED TO THE COMMITTEE BY PRESIDENT HARRY TRUMAN WHEN HE ESTABLISHED IT IN 1947 AND I HAVE SERVED UNDER EVERY PRESIDENT SINCE THEN. I HAVE BEEN THE CHAIRMAN FOR THE PAST TWENTY-FIVE YEARS. THE MISSION OF THE PRESIDENT'S COMMITTEE IS TO PROMOTE MAXIMUM EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES.

I AM HONORED TO HAVE THIS OPPORTUNITY TO ADDRESS YOU REGARDING COMPREHENSIVE CIVIL RIGHTS PROTECTIONS FOR PERSONS WITH DISABILITIES. THE VIEWS PRESENTED IN THIS STATEMENT ARE MY OWN AND NOT THOSE OF THE ADMINISTRATION. THE ADMINISTRATION HAS FORMED A POLICY WORKING GROUP TO DEAL WITH THIS ISSUE. THE GROUP IS RESPONSIBLE FOR ASSESSING THE EXTENT OF DISCRIMINATORY PRACTICES AGAINST INDIVIDUALS WITH DISABILITIES AND FOR MAKING RECOMMENDATIONS AS TO HOW TO CORRECT THESE PRACTICES SO THAT THESE INDIVIDUALS CAN FULLY PARTICIPATE IN OUR SOCIETY.

IN 1982, PETERS AND WATERMAN, IN THEIR NOW CLASSIC IN SEARCH OF EXCELLENCE, STATED, "TREAT PEOPLE---NOT CAPITAL SPENDING AND AUTOMATION---AS THE PRIMARY SOURCE OF PRODUCTIVITY GAINS."

IN HIS 1983 BOOK THE NEXT AMERICAN FRONTIER, ALAN REICH SAID, "WE ARE ENTERING A NEW ERA OF PRODUCTIVITY IN WHICH THE COSTS, THE PROCESS, AND THE RETURN FROM INVESTMENTS IN HUMAN CAPITAL ALL ARE INDESCAPAL [illegible]TIAL. IN THE ERA OF HUMAN CAPITAL..., FAILING TO

RECOGNIZE THIS AND TO RESPOND WITH THE RIGHT MECHANISMS TO SUPPLEMENT THE MARKET MEANS STIFLING THE SOURCES OF FUTURE ECONOMIC GROWTH."

ONLY LAST YEAR, THE HUDSON INSTITUTE'S WORKFORCE 2000 AND OPPORTUNITY 2000 CONCLUDED THAT "(B)USINESSES WILL BE ABLE TO SATISFY THEIR LABOR NEEDS ONLY IF THEY SUCCESSFULLY CONFRONT... BARRIERS AND EMPOWER INDIVIDUALS PRESENTLY OUTSIDE THE ECONOMIC MAINSTREAM TO TAKE ADVANTAGE OF MEANINGFUL EMPLOYMENT OPPORTUNITIES."

WHILE THESE STATEMENTS ARE KEYS TO THE FUTURE OF AMERICA'S ECONOMIC VITALITY, THEY ARE AXIOMS FOR AMERICA'S RESPONSE TO THAT PORTION OF ITS HUMAN CAPITAL COMPRISED OF PEOPLE WITH DISABILITIES. IN SHORT, WE CANNOT UNDERINVEST IN HUMAN CAPITAL; WE CANNOT UNDERINVEST IN PEOPLE WITH DISABILITIES. COMPREHENSIVE CIVIL RIGHTS LEGISLATION FOR PERSONS WITH DISABILITIES CAN BE AN INVESTMENT BLUEPRINT FOR BRINGING THIS HUMAN CAPITAL TO ITS HIGHEST LEVELS OF RETURN, AND ENDING THE WASTE OF OUR CURRENT ASSETS.

ANY SUCH BLUEPRINT TELLS US THAT OUR INVESTMENT MUST BE COMPREHENSIVE. A BREAK IN ANY LINK IN THE CHAIN THAT CONNECTS INDIVIDUALS WITH DISABILITIES TO THE WORKPLACE CREATES A BARRIER WHICH MANY TIMES CANNOT BE BRIDGED. TO HAVE LESS THAN ADEQUATE ACCESSIBLE PUBLIC TRANSPORTATION SERVICES FOR AN INDIVIDUAL WHO IS PROTECTED FROM DISCRIMINATION IN EMPLOYMENT, OR WHO HAS RECEIVED OTHER, NUMEROUS FEDERALLY-FUNDED SERVICES IS ANALOGOUS TO THROWING AN

ELEVEN-FOOT ROPE TO A DROWNING MAN TWENTY FEET OFF SHORE AND PROCLAIMING YOU ARE GOING MORE THAN HALF WAY.

OUR INVESTMENT MUST DRAW UPON EXPERIENCE. MR. CHAIRMAN, YOU AND THE OTHER SPONSORS OF THE LEGISLATION BEFORE YOU ARE TO BE COMMENDED FOR YOUR DECISION TO USE THE TERMS "QUALIFIED INDIVIDUAL WITH A DISABILITY", TO DESCRIBE THOSE INDIVIDUALS PROTECTED FROM EMPLOYMENT DISCRIMINATION, AND "UNDUE HARDSHIP" TO DEFINE LIMITATIONS ON THE DUTY TO ACCOMMODATE. THESE TERMS SIGNAL AN EFFORT TO PROVIDE EMPLOYERS A WORKABLE AND FAMILIAR FRAMEWORK FOR MEETING THE REQUIREMENTS OF THE LEGISLATION.

EMPLOYERS HAVE PRACTICAL EXPERIENCE WITH PROVIDING COST-EFFECTIVE TECHNOLOGIES TO IMPROVE THE PRODUCTIVITY OF ALL SEGMENTS OF THEIR WORK FORCE, FROM CLERICAL POOLS TO ASSEMBLY LINES. EQUALLY, EMPLOYERS HAVE PRACTICAL EXPERIENCE WITH COST-EFFECTIVE ACCOMMODATIONS FOR THEIR EMPLOYEES WITH DISABILITIES. LAST YEAR, THE JOB ACCOMMODATION NETWORK (JAN), SPONSORED BY THE PRESIDENT'S COMMITTEE, SAW A FORTY-TWO (42) PERCENT INCREASE IN ITS USE BY EMPLOYERS SEEKING ADVICE ON VARIOUS ASPECTS OF ACCOMMODATING EMPLOYEES WITH DISABILITIES. SEVENTY-TWO (72%) PERCENT OF THESE INQUIRIES RESULTED IN THE RETENTION OR PLACEMENT OF SUCH WORKERS.

THE 1982 STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS REPORTED THAT "NO COST WAS INVOLVED

FOR HALF (51%) OF THE ACCOMMODATIONS REPORTED. AN ADDITIONAL 30 PERCENT OF THE ACCOMMODATED WORKERS RECEIVED PACKAGES OF ACCOMMODATIONS FOR WHICH THE TOTAL COST WAS BETWEEN $1 AND $500."

IN 1987, HONEYWELL, IN ITS OWN REPORT ON EMPLOYEES WITH DISABILITIES, INDICATED THAT "THE MAJORITY OF ACCOMMODATIONS PROVIDED TO EMPLOYEES WITH DISABILITIES COST LESS THAN $50." HONEYWELL ALSO NOTED THE AVAILABILITY OF TAX DEDUCTIONS AND MONIES FROM FEDERAL AND STATE GOVERNMENTS TO FURTHER DEFRAY THE COSTS.

EMPLOYERS AND BUSINESSES CAN RECOGNIZE AND HAVE RECOGNIZED, THE NEED TO MAKE THE ACCEPTABLE INVESTMENTS IN THEIR HUMAN CAPITAL REPRESENTED BY REASONABLE ACCOMMODATIONS. SMALL BUSINESSES HAVE DEMONSTRATED INGENUITY IN REDUCING THE RELATIVE COSTS OF ACCOMMODATIONS THROUGH SUCH INNOVATIONS AS ACCELERATED DEPRECIATION SCHEDULES FOR EQUIPMENT PURCHASES, SUBSIDIZING PERSONAL EQUIPMENT OF EMPLOYEES, AND FORMING CONSORTIUMS FOR DISABILITY MANAGEMENT SERVICES.

MORE IMPORTANTLY, EMPLOYERS RECOGNIZE THE "PENNY-WISE AND DOLLAR FOOLISH" RESULTS OF FAILING TO MAKE THESE INVESTMENTS NOW. EMPLOYERS UNDERSTAND THAT THE FAILURE TO MAKE SUCH INVESTMENTS IN THE PAST HAVE CONTRIBUTED TO THE RISE IN TOTAL DISABILITY EXPENDITURES IN THIS NATION FROM $19.3 BILLION DOLLARS IN FISCAL YEAR 1970 TO $169.4 BILLION DOLLARS IN FISCAL YEAR 1986.

IT IS IMPORTANT TO UNDERSTAND THAT PRIVATE SECTOR DISABILITY EXPENDITURES, PAID IN THE FORM OF PAYMENTS THROUGH INSURANCE POLICIES, PRIVATE PENSIONS, AND INDEMNITY CLAIMS, ARE BECOMING A GREATER PERCENTAGE OF TOTAL DISABILITY EXPENDITURES. IN 1986, SUCH PRIVATE EXPENDITURES TOTALED $31.8 BILLION. EMPLOYERS KNOW, FIRST-HAND, THAT THESE DISABILITY-RELATED EXPENSES ARE A PART OF THE COST-BENEFIT EQUATION IN DETERMINING THE IMPACT OF IMPLEMENTING CIVIL RIGHTS LEGISLATION.

IN THE COURSE OF MY WORK, I HAVE MET EMPLOYERS, LARGE AND SMALL, WHO HAVE TAKEN THE TIME TO UNDERSTAND THE FACTS, AND WHO HAVE TOLD ME THAT THEY ARE WILLING TO MAKE THE INVESTMENT NECESSARY TO PUT INDIVIDUALS WITH DISABILITIES TO WORK, AND TO SUPPORT CIVIL RIGHTS LEGISLATION THAT WILL GUARANTEE THEM EQUAL EMPLOYMENT OPPORTUNITIES. THEY CONSISTENTLY CITE FEAR AND MISUNDERSTANDING AS THE LARGEST HURDLE MOST EMPLOYERS MUST OVERCOME.

FOUR DECADES OF EXPERIENCE BY THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES HAVE DEMONSTRATED THAT GOOD WILL AND KNOWLEDGE ALONE DO NOT RESULT IN EMPLOYMENT. LET THERE BE NO DOUBT THAT JOB DISCRIMINATION ON THE BASIS OF DISABILITY IS A FAR TOO COMMON OCCURENCE IN THE LIVES OF PEOPLE WITH DISABILITIES. A THREE-FOURTHS (3/4) MAJORITY OF TOP MANAGERS (THE PEOPLE WHO DO THE HIRING!) SURVEYED IN A 1986 HARRIS POLL FEEL THAT PERSONS WITH DISABILITIES OFTEN ENCOUNTER DISCRIMINATION FROM EMPLOYERS. THE

FIFTY (50) STATE GOVERNOR'S COMMITTEES, WITH WHOM THE PRESIDENT'S COMMITTEE WORKS, REPORT THAT EXISTING STATE LAWS DO NOT ADEQUATELY COUNTER SUCH ACTS OF DISCRIMINATION.

IT IS IMPORTANT TO NOTE THAT 56% OF TOP MANAGERS SURVEYED IN THE SAME HARRIS POLL SUPPORTED THE CONCEPT THAT CIVIL RIGHTS LAWS WHICH PROTECT MINORITIES AGAINST DISCRIMINATION SHOULD ALSO APPLY TO PEOPLE WITH DISABILITIES. WHILE I CANNOT SPEAK FOR PRIVATE SECTOR EMPLOYERS, I AM AN EMPLOYER OF PERSONS WITH DISABILITIES. TWO-THIRDS (2/3) OF MY STAFF ARE PERSONS WITH DISABILITIES, SO I CONTINUE TO EXPERIENCE FIRST-HAND THE ACCOMMODATION PROCESS, AND TO BENEFIT FROM THE OUTSTANDING CONTRIBUTIONS PERSONS WITH DISABILITIES MAKE TO THE ROLE AND MISSION OF THE PRESIDENT'S COMMITTEE.

MR. CHAIRMAN, THERE IS A REASON FOR WHAT MAY APPEAR TO SOME TO BE A SURPRISINGLY PROGRESSIVE ATTITUDE AMONG EMPLOYERS REGARDING CIVIL RIGHTS FOR INDIVIDUALS WITH DISABILITIES. I SINCERELY BELIEVE THAT THE FIERCELY INDEPENDENT NATURE OF AMERICA'S BUSINESS COMMUNITY MAKES IT EASY FOR THEM TO UNDERSTAND THE DESIRES OF AMERICANS WITH DISABILITIES FOR INDEPENDENCE AND JUSTICE. THEY UNDERSTAND THAT THE INVESTMENTS WE ARE TALKING ABOUT HERE ARE NOT JUST INVESTMENTS IN HUMAN CAPITAL, THEY ARE INVESTMENTS IN THE HUMAN SPIRIT.

STATEMENT
on
THE AMERICANS WITH DISABILITIES ACT OF 1989
before the
SENATE SUBCOMMITTEE ON LABOR AND HUMAN RESOURCES
for the
U.S. CHAMBER OF COMMERCE
by
Zachary Fasman

May 9, 1989

I. STATEMENT OF INTEREST

I am Zachary Fasman, a partner in the Washington office of the law firm Paul, Hastings, Janofsky & Walker. I am a labor lawyer by trade and have substantial experience in the employment discrimination field. My firm is represented on the U.S. Chamber of Commerce's Labor Relations Committee, and it is in this capacity that I appear before you today.

I appreciate the opportunity to express the Chamber's views on the Americans with Disabilities Act of 1989. I will direct my comments this morning to the employment provisions of the Act.

The Chamber shares the goal of the authors of this Act: that all individuals should have the opportunity to participate in our society. Workers with disabilities have demonstrated that their job performance competes with and frequently exceeds that of other workers in productivity, efficiency and favorable accident and absentee rates. Full participation in our economic life by people with disabilities is essential as we face global economic challenges, as well as important for the dignity of the individuals in question.

We have concluded, however, that this legislation, as presently drafted, is not an appropriate or equitable vehicle for achieving the Congressional goal with which we agree. We have several very significant concerns about this bill.

II. STRUCTURE OF THE ACT

Initially, I would note that two titles of this Act regulate the employment relationship. Title I of the Act contains broad general prohibitions that apply to "benefits, jobs, and other opportunities," while Title II is a more specific, traditional and straight-forward prohibition on employment discrimination. We see no reason for two separate prohibitions and especially are concerned because the provisions of Title I are extremely unclear and appear to impose unwarranted obligations in the workplace. For example, Title I states that it is discriminatory to provide "an individual with a service, program, activity, benefit, job or other opportunity that is less effective than that provided to others" (emphasis added) (Section 101(a)(1)(C)). We have no idea what the bill might mean by a "less effective" job or benefit. Nor do we understand what the bill means when it prohibits providing an individual "with a service, program, activity, benefit, job or other opportunity that is different or separate" (emphasis added). This vague language is an invitation to litigation. We believe that it would be a terrible mistake to empower the courts to determine whether one job or benefit is "less effective" than or "different from" another.

In our view, if Congress wishes to regulate the employment relationship, it should do so directly. There are many useful models already on the books, and we believe that a straight-forward prohibition on employment discrimination avoids the disturbing questions. We see nothing to be gained by applying vague prohibitions of the sort contained in Title I of this Act to the employment relationship. We suggest that all references to employment be deleted from Title I; that the bill clarify that the only obligations placed upon private employers are contained in Title II; and that the bill concentrate on creating an effective and specific prohibition on employment discrimination in Title II.

III. DEFINITIONS

Before turning to Title II itself, let me address two definitional sections in the Act.

The first is the Act's definition of "reasonable accommodation," which we believe is overly broad, unclear and unnecessary. The Act defines "reasonable accommodation" to include "adoption or modification of procedures and protocols, the provision of qualified readers or interpreters, and other similar accommodations" (Section 3(3)(B)). Does this language require all employers, as a matter of legal obligation, to provide interpreters and readers for all disabled employees or applicants who might benefit thereby? Would a job be deemed "less effective" for a visually or hearing-impaired employee if a reader or interpreter were not provided? Does the bill require employers to alter production methods to suit the needs of every disabled employee or applicant? If so, how broad must the modification be? What if the needs of different disabled employees conflict -- whose disability governs?

These are real questions that will be decided by the courts if the bill is passed as drafted. If Congress does not intend to impose such broad obligations upon all employers, we suggest that the definition of "reasonable accommodation" in employment not be defined in the proposed bill, but rather left to the courts, or that the term be defined in a specific and limited fashion in

Title II.

If Congress intends to require all private employers to provide readers and interpreters and to engage in wholesale modification of the workplace, we believe that Congress is acting very unwisely. It is one thing to require recipients of federal grants to use some of those federal monies to ensure that the workplace is as hospitable as possible to the disabled, as Congress traditionally has done under Section 504 of the Vocational Rehabilitation Act of 1973. It is quite another to impose such obligations upon all employers as a matter of positive law.

The costs of this action would be enormous and obviously could have a disastrous impact upon many small businesses struggling to survive. If the bill is intended to impose such obligations, we suggest substantial revision in its jurisdictional reach so as to exclude small businesses entirely.

Moreover, the presence of foreign competition calls into question the ability of any American business, large or small, to pass on these very substantial costs to the consumer. Imposition of these costs on employers threatens to make American business even less competitive in our increasingly global economy.

Alas, we would note that the definition of a handicap does not exclude alcohol or drug abuse, does not it exclude individuals with a contagious disease, in cases where the alcohol or drug abuse or the contagious disease poses a direct danger to the property, health or safety of others. The Vocational Rehabilitation Act of 1973 properly excludes these conditions from the definition of a handicap for employment purposes, thus allowing employers to protect employees in the workplace whose health and safety otherwise might be endangered. See 29 U.S.C.

Sections 706 (8)(B),(C). This Act does allow employers to create "qualification standards" based upon drug or alcohol use or contagious disease but also provides that all qualification standards must "be both necessary and substantially related to the ability of an individual to perform . . . the essential components" of the job (Section 101 (b)(2)).

This is a significant limitation upon employers' ability to protect their employees (as well as creates safety ramifications regarding customers, clients and the public at large). It is particularly inappropriate that Congress should be considering such provisions at the same time that American business is increasingly being required, by federal agencies, to create and preserve a drug-free workplace. We suggest that contrary to the current provisions, this bill specify that casual use of drugs or alcohol is not a handicap and that alcohol or drug use by an alcoholic or drug addict is not a handicap unless the employee can show that the alcohol or drug use does not pose a direct threat to the property or safety of others in the workplace. We suggest that the statute incorporate the language of the Vocational Rehabilitation Act of 1973 (29 U.S.C. Section 706(8)(C)), dealing with contagious diseases, as an exclusion to the definition of handicap as well.

IV. TITLE II

Our concerns with regard to Title II of the bill are less global but still highly significant.

First, the bill defines a qualified individual with a disability as one who can, with or without reasonable accommodation, perform the "essential functions" of a job; subsequently, the bill provides that tests or selection criteria are appropriate so long as they test whether an employee or applicant can perform the "essential functions" of a job. We suggest that the concept of "essential functions" of a job makes no sense and ought to be eliminated from the bill. Either a disabled person can perform the job, with reasonable accommodation, or he cannot. It is too substantial an intrusion on the legitimate prerogatives of employers to ask federal agencies, the courts and juries to define which aspects of a particular job are "essential" and which are not.

Second, we are troubled by the manner in which the term "discrimination" is defined. Section 202(b) not only makes it unlawful to deny a reasonable accommodation but also proscribes the "failure . . . to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability. . ." (Section 202(b)(1)). As is currently the case under the Vocational Rehabilitation Act of 1973, the initial onus clearly should be placed upon the employee or applicant to identify himself as handicapped and to advise the employer of the type of accommodation that he or she desires. Any other construction would require employers to question employees or applicants about their disabilities. By ensuring that the employee or applicant must notify the employer both of the disability and the accommodation, employers would be protected from committing completely unintentional violations of the Act, and the privacy of individuals who would prefer not to disclose their handicaps would be preserved.

Finally, we believe that it is unwise to allow the employment provisions of the Act to be enforced under 42 U.S.C. Section 1981 as well as under Title VII procedures. The Title VII enforcement scheme, built around agency expertise and conciliation in order to provide rapid relief to charging parties, proceeds from a completely different premise than does the Civil Rights Act of 1866. The latter statute allows an injured party to proceed directly into federal court, with no requirement that a charge be filed with any administrative agency. Title VII, by contrast, requires the filing of a charge as a prerequisite to suit, and thus necessarily involves an administrative agency in the prosecution process. This statute will require substantial administrative interpretation before its provisions achieve concrete form and thus would seem particularly suitable for administrative enforcement.

Moreover, Section 1981 cases are tried to a jury, while Title VII cases are not. Relief under Title VII does not include compensatory damages, while such relief may be available under Section 1981. In short, there are significant differences between these two enforcement schemes, and we suggest that Congress choose one or the other. We strongly would support the Title VII scheme, which is aimed directly at employment matters and embodies the considered judgment of Congress on how to enforce anti-discrimination provisions in the workplace.

On behalf of the Chamber, I thank the Committee for its attention and am prepared to answer any questions regarding my remarks.

Prepared Statement of Lawrence Z. Lorber

I am Lawrence Z. Lorber, a partner in the law firm of Kelley Drye & Warren; previously, I was Deputy Assistant Secretary of Labor and Director of the OFCCP in 1975 and 1976. During my tenure at the Department of Labor, the OFCCP was officially amalgamated with the addition of the handicapped and veterans functions of Section 503 of the Rehabilitation Act of 1973 as amended and Section 2012 of the Vietnam Era Veterans Act of 1974. And it was during my tenure that the initial regulations implementing § 503 were issued by the Department of Labor.

Today, I am testifying on behalf of the American Society for Personnel Administration (ASPA). With over 40,000 individual members, ASPA is the world's largest society dedicated exclusively to excellence in human resources management. ASPA members work for large and small employers which collectively employ more than 41 million people. We are therefore vitally concerned with the orderly evolution of laws defining, in practical terms, the meaning of equal employment opportunity.

ASPA has long recognized its special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity, and has encouraged its members to actively recruit from all pools of qualified candidates. We believe that adherence to these principles is sound management practice and contributes significantly to the success of our membership and our members' organizations.

ASPA has also acted to give its members the tools to improve their efforts to recruit people with disabilities. In 1985, as part of ASPA's Human Resource Management Series, we published a monogram which is available to ASPA members entitled "Job-Match: A Process for Interviewing and Hiring Qualified Handicapped Individuals".

More recently, in December of 1988, ASPA assumed the expense of providing its 40,000 members with a copy of the Fall issue of Worklife: A Publication on Employment and People With Disabilities, published by the President's Committee on Employment of People With Disabilities (see Attachment 1). ASPA was willing to do so because we share the goal of the President's Committee -- to make companies aware of the employment potential of people with disabilities.

As you can see, ASPA has been in the forefront of employers' efforts to ensure that disabled Americans participate fully in the workplace to lend their considerable and unfortunately untapped talents to a productive and vibrant economy. We, therefore, applaud the notion of a unified statute establishing one standard to deal with the problem of lingering employment discrimination against disabled Americans. However, in reviewing the latest draft of the Americans with Disabilities Act of 1989, we are concerned that serious legal, and practical employment issues are created which will make effective implementation difficult and create an unnecessary legal quagmire.

To address those concerns, we respectfully offer these comments and suggestions on the legislation. ASPA looks forward to the opportunity to work with the Committee to structure a feasible and workable statute.

With respect to the basic premise of the proposed legislation, we suggest one significant problem. The explanatory materials provided by the Committee suggest that the drafters looked to § 504 of the Rehabilitation Act and its implementing regulations as the model upon which this legislation is based. Yet the draft legislation which is the subject of these hearings seems designed in part to specifically countermand the interpretations of § 504 by the Supreme Court in a series of cases, most notably Alexander v. Choate, 469 U.S. 287 (1985). In that case Mr. Justice Marshall, speaking for a unanimous Supreme Court stated that the serious problems faced by disabled Americans did not lend itself to a broad based impact review of all policies and procedures. Justice Marshall suggested that a more tailored response weighing the legitimate aspirations of the disabled with equally legitimate concerns of business and government was appropriate. While the Congress obviously has wide latitude in crafting new legislation, the historical interpretations of legislation which serve as the predicate for new legislation ought not to be cast aside without careful consideration.

The general definition of prohibited forms of discrimination found in Title I prohibits the employer from providing a job that is "less effective" than those provided to others. That section goes on to require that the standards for defining equal opportunity assure that individuals with disabilities achieve the same result as non-disabled individuals. Such a legal obligation in the context of employment exposes employers to litigation potential of unimaginable complexity. In the employment context, a same result standard could compel an average compensation analysis to ensure that disabled employees achieve the same average compensation as all employees. This combination of the § 504 program access concept with general employment concerns is an unwieldy and unnecessary burden to be placed on employers.

In this context, the definitions of reasonable accommodations found in Section 3(3)(B) is a clear affirmative action requirement looking to creative efforts to ensure access rather than a legal standard against which to determine if an employer was guilty of discrimination. However, Title II defines employment discrimination as, inter alia, the failure to make reasonable accommodation to the known physical or mental limitation of a qualified individual with a disability. The only coherent construction of these obligations would compel employers to undertake continuous job restructuring to ensure that particular disabilities are accommodated. Thus, where an employer provides open bidding for jobs, whether union or not, and in which the standards for selection are based on seniority and prior performance, an employer would be compelled to constantly restructure a job for each applicant with a disability before selection to avoid being found in violation of the non-discrimination standards of the law.

This mixing of the § 504 non-discrimination requirements with the § 503 affirmative action obligations in the employment context will be unworkable. Too, the notion of a qualified individual with a disability presumes that with accommodation the individual can perform the job. Whereas the definition of reasonable accommodation in the statute requires wholesale job and job function restructuring prior to the employment decision so as to avoid allegations of discrimination. Concepts are combined without reference to the particular concerns of the workplace.

We would further question the efficacy of including within the theories of discrimination permitted by the legislation an impact test in the context of a universal statute which in separate sections deals with every other aspect of commercial intercourse and which is additive to the already extensive requirements of the 1973 Rehabilitation Act. The impact test evolved under Title VII of the 1964 Civil Rights Act to deal with those limited circumstances in which broad based employment practices, unproven as job related, served to exclude classes of individuals. The draft legislation before this Committee would, however, establish the impact analysis as an individual standard insofar as each separate disability requires a different response in the employment situation. Here again, Mr. Justice Marshall spoke to this issue and we would urge the Committee to examine closely the reasoning in the Alexander decision. We would suggest that the serious employment problems this legislation is designed to attack are not well suited for such a broad based assault -- and that employers will be held to standards they will be unable to address before litigation. While there might be eventual relief for certain individuals with the wherewithal and resources to conduct extended litigation, this provision will surely inhibit broad scale reasonable accommodation efforts.

In this context, we would note that Section 202(b)(3) proscribes the application of tests or selection criteria would limit opportunities for individuals or groups "unless such standards, tests or other criteria can be shown by [the employer] to be necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position."

This provision ought to raise several caution signals. The legislation is silent, as it must be, in defining what constitutes an "essential function" of a particular job. Courts will be asked to parse job descriptions to separate the essential from the merely additive regardless of the employer's own inputs. Job descriptions will have to be drafted with excruciating specificity in order to enumerate all "essential" functions, though for executive, professional, technical and even some administrative jobs without defined products or specified methods of production, such specificity would be impossible. Too, this section will surely encompass performance appraisals and compensation systems which are designed for general application and would require instead tailored systems for each employed disabled worker. And actual physical employment criteria such as lifting requirements, strength and agility tests would be subjected to individual review in which the selection criteria would have to be shown to be necessary for the essential function of the job, a standard which probably cannot be met.

Such a burdensome requirement in the employment context which would require individual test validation is in contrast with the current regulations of the Department of Labor found at 41 CFR § 60-741.5(C)(2) which adopt the accepted legal standards for test validation. We would urge the Committee to look to those employment standards as its model rather than mix in the programmatic requirements of § 504 which are inapplicable in a private employment context where the employer, not the government, pays for the changes.

Too, we would note with particular concern that this legislation, which defines discrimination as the failure to undertake reasonable accommodation also provides that the affirmative action requirements of § 503 of the Rehabilitation Act for federal contractors remains in place. See Section 601(a)(b). Contractor employers are thus placed in the untenable position of complying with the dictates of the Labor Department with respect to the affirmative action to undertake reasonable accommodation only to find that an OFCCP administrative determination that the affirmative action obligation has not been met, becomes by action of this statute, a prima facie determination of discrimination. The clash of concepts will inevitably result in more cautious explorations by employers of reasonable accommodation alternatives because of the attendant risk of legal liability.

The enforcement structure contemplated by the legislation providing both Title VII and § 1981 type relief makes little sense. Disabled Americans in particular would benefit from rapid administrative redress of concerns. Expertise in the design of feasible alternative work procedures to accommodate individual disabilities can best be accomplished in an administrative and not judicial setting. Does this Committee truly want the access of disabled Americans to employment opportunities be dependent upon resolution of disputes by overcrowded courts following a lengthy clash of experts through deposition and court testimony only to be followed by the next contest with a different disability for a different job? The case by case resolution before a jury required by the § 1981 option makes no sense nor are the extensive contract based remedies under § 1981 applicable to the disability context. Were this Committee to ensure that adequate resources were available in the EEOC to carry out the functions required by this legislation, the Title VII model, with administrative review in the first instance is the only feasible way to proceed.

Our courts are now understandably hostile to the multiplicity of statutory and common law relief available in the employment context. We should not unnecessarily increase that problem with this legislation.

We would address this Committee's attention to the provisions of Section 101(b)(2) pertaining to alcohol and drug use in the workplace and note, at the very least, the conflict between this provision and that of the recently enacted Drug Free Workplace Act which requires government contractors and suggests to all employers to establish a drug-free workplace. While hopefully unintended, § 101(b)(2) negates that requirement by requiring an adverse causal relationship be established between drug and alcohol use in the workplace before employers can prohibit such use.

Finally, we would strongly suggest that the Committee reconsider its decision to make undue hardship the test for determining the efficacy of the reasonable accommodation. In the employment context, such a standard will prove unworkable and create significant disincentives to employers. Notwithstanding the reference to § 504, we would reiterate that this legislation covers private employers who are not receiving federal contracts or grants and who must therefore bear the entire financial burden of compliance. Section 504 is thus an imperfect model at best for private employers.

The concerns outlined above essentially relate to technical legal issues, burdens of proof and administrative structures applied to the workplace. The legislation seems to pick and chose among the most expansive provisions of Title VII, Sections 503 and 504 of the Rehabilitation Act and Section 1981 to provide a statutory scheme for resolving employment concerns of disabled Americans. Such a weighting of the scales is unnecessary and unwise. ASPA therefore respectfully urges this Committee to review the employment requirements and structure a system designed to provide rapid and fair relief to disabled individuals, and to create understandable and feasible obligations for employers.

Work life

PEOPLE WITH DISABILITIES

FALL, 1988
VOLUME 1, NUMBER 3

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Especially Prepared for ASPA Members
Please read inside front cover.

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Dignity, Equality, Independence Through Employment

December, 1988

Dear ASPA Member:

The President's Committee on Employment of People With Disabilities takes pleasure in introducing you to our new quarterly magazine, Worklife: A Publication on Employment and People With Disabilities.

Worklife is a magazine aimed at employers across this nation, at people with disabilities and at rehabilitation professionals who work with both constituencies. Our goal is to make our readers more aware of the skills and abilities of individuals with disabilities, a vast resource of people who remain ready for employment ... people who are disabled, but able to work.

We hope that you will find the magazine an appealing addition to your read list. You may obtain a free subscription by tearing off the perforated card on the back cover, filling in your name and address (or attaching your business card) and mailing it to the Worklife editor.

Our mission, at the President's Committee, is to make companies aware of the employment potential of people with disabilities. The incentive for your company is an alternative labor pool resource and for the worker with a disability it brings independence, life where a salary is earned and taxes are paid. That is the bottom line.

Reading Worklife can create a new awareness in a movement that shows a profit for business, people with disabilities and the nation.

That is our bottom line. Keeping you informed.

Sincerely,

Harold J Russell

Harold Russell
Chairman

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Prepared Statement of Arlene B. Mayerson

I. INTRODUCTION

The general public does not associate the word "discrimination" with the segregation and exclusion of disabled people. Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history.

Most people are never forced to examine their assumptions or stereotypes about disabled people unless they themselves or a family member become disabled, or they have a disabled child. At that point the falseness of the stereotypes and the injustice of the policies based on those stereotypes become all too apparent.

Historically, the inferior economic and social status of disabled people was viewed as an inevitable consequence of the physical and mental limitations imposed by disability. Over the years, this assumption has been challenged by policy makers, professionals, disabled citizens, the courts and by Congress. Gradually, disability public policy has recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions and deeply embedded prejudices toward disabled people. These discriminatory policies and practices affect disabled people in every aspect of their lives.

The first major challenge to the notion that being disabled meant life-long economic dependency was prompted by the return of a vast number of disabled World War I veterans and the ever increasing incidence of industrial accidents. Recognizing the social and financial benefit of returning these injured persons to work, Congress passed the original landmark federal rehabilitation legislation, the Smith Fess Act of 1920. The prevalent view of disabled people as "helpless" and "hopeless" was challenged by legislation designed to enable disabled people to become productive, contributing members of society. Most importantly, by the mid 1960's the explicit goal of rehabilitation policy was the integration of disabled people into the mainstream of American life.[1] This "integrationist" goal set the stage for an examination of the social barriers that impede the attainment of equal opportunity for disabled Americans.

From a civil rights perspective, a profound and historic shift in disability policy occurred in the 1970's.[2] Following

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[1] See H. R. Rep. No. 432, 89th Cong. 1st Sess. 2 (1965).

[2] This shift in public policy is well portrayed in a statement made by Senator Williams prior to the enactment of the 1973 Rehabilitation Act:

> For too long, we have been dealing with [the handicapped] out of charity . . . . This is medieval treatment for a very current problem . . . . Most of us see the handicapped only in terms of stereotypes that are relevant for extreme cases. This ancient attitude is in part the result of the historical separation of our handicapped population. I wish it to be said of America in the 1970's that when the attention at last returned to domestic needs, it made a strong and new commitment to equal opportunity and equal justice under law; . . . The handicapped are one part of our Nation that have been denied these fundamental rights for too long. It is time for the Congress and the Nation to

the powerful civil rights activism of the 1960's, the 1970's produced a more fundamental change in the social and legal status of disabled people than any prior era of American history. Through landmark litigation[3] and legislation,[4] disabled Americans were recognized for the first time as a legitimate minority subject to discrimination and worthy of basic civil rights protections.

This major shift in disability public policy culminated in the passage of a broad anti-discrimination provision, Section 504 of the Rehabilitation Act of 1973. Section 504 evidences Congress' recognition that while there are major physical and mental variations in different disabilities, disabled people as a

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assure that these rights are no longer denied. 118 Cong.Rec. 3321-22 (1972).

[3] Two landmark cases Pa. Assoc. for Retarded Citizens v. Commonwealth of Pa., 334 F.Supp. 1257 (E.D. Pa. 1971); and Mills v. Bd. of Education of the Dist. of Columbia, 348 F.Supp. 866 (D.D.C. 1972), held that disabled children who had previously been excluded from public education had the right to a public education appropriate to their educational needs.

[4] In addition to the 1973 Rehabilitation Act, Congress enacted several other pieces of legislation designed to promote equal opportunity and integration of disabled people into the mainstream of American life. Chronologically, these statutes included: 1968--Architectural Barriers Act, 42 U.S.C. Section 4151 *et seq.* (required federally funded or leased buildings to be accessible); 1970--Urban Mass Transportation Act, 49 U.S.C. Section 1612 (required eligible jurisdictions to provide accessibility plans for mass transportation); 1975--Education for All Handicapped Children Act, 20 U.S.C. Section 140 *et seq.* (provided that each handicapped child was entitled to a free appropriate education in the least restrictive environment); and 1975--National Housing Act Amendments, 12 U.S.C. Section 1701 *et seq.* (provided for barrier removal in federally supported housing).

group faced similar discrimination in employment, education and access to society. As with racial minorities and women, Congress recognized that legislation was necessary to ameliorate widespread institutionalized discrimination.[5]

Nothing is more central to the goal of independence than employment. As demonstrated below, disabled Americans face widespread discrimination in seeking to secure equal employment opportunities. The Rehabilitation Act covers private employers only when they receive federal funds or federal contracts. It is now time to finish the work begun in 1973--to recognize the basic civil rights of people with disabilities by providing the same protection against employment discrimination as is afforded other minorities and women. Passage of the ADA is essential to assure Americans with disabilities equal employment opportunity.

II. THE NATURE AND HISTORY OF PREJUDICE TOWARDS DISABLED PEOPLE

The roots of prejudice against and stereotypes about disabled people reach far back in history and persist today. Disabled people have throughout history been regarded as incomplete human beings--"defective." In early societies this view of disabled people resulted in persecution, neglect and death.[6] These practices gradually gave way to the more humanitarian belief that disabled people should be given care and protection. Persecution was largely replaced by pity, but the exclusion and segregation of disabled people remained unchallenged.[7] Over the years, the view of disabled people as incompetent and dependent upon charity, custodial care and protection became firmly embedded in the public consciousness. The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.

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[5] That Section 504 was intended to include disability within the general corpus of federal anti-discrimination law is unmistakable. As stated in the Senate Report accompanying the 1974 amendments:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972 . . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. Id. at 39, reprinted in 1974 U.S. Code Cong. & Ad. News at 6390.

The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of "good intentions." The innate biological and physical "inferiority" of disabled people is considered self-evident. This "self-evident" proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk--it has meant being excluded from public school,[8] being denied employment opportunities,[9] and being deemed an "unfit" parent.[10] These injustices co-exist with an atmosphere of charity and concern for disabled people.

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[6] For an historical overview of persecution of disabled people in early societies, See Burgdorf and Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause, 15 Santa Clara Law. 882-86 (1975).

[7] Interestingly, a positive relationship has been established between tendencies to pity blind people on the one hand, and the tendency to espouse community segregation for the blind on the other. Lukoff & Whiteman, Attitudes Towards Blindness, 55 The New Outlook for the Blind 39, 42 (1961)

It is only within the last decade that a fundamental challenge to traditional notions about disability has been launched. Increasingly, the social science and psychological literature has explored the implications of a socio-political definition of disability that recognizes the critical impact of social factors on the lives of disabled Americans.[11] There is a growing awareness of the similarities between racial prejudice and the prejudice experienced by disabled people.[12] And like women, disabled people have identified "paternalism" as a major obstacle to economic and social advancement.

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[8] "Many of the physically handicapped children do have the mental ability to attend public school but are denied that right due to architectural barriers and-or transportation problems." 117 Cong. Rec. 42293 (1971).

[9] In Heumann v. Bd. of Education of the City of N.Y., 320 F.Supp. 623 (S.D. N.Y. 1970) plaintiff was denied a license to teach "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching.

[10] "Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent, regardless of whether affectional or socio-economic advantages could have been offered by the disabled parent." I. Vash, The Psychology of Disability 155 (1981).

This issue was eloquently addressed in a landmark decision by the California Supreme Court, Carney v. Carney, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979). In that case the lower court awarded custody to the mother of two boys after the father was injured and became a quadriplegic. The California Supreme Court reversed, stating that ". . .the court's preconception . . . also stereotypes William as a person deemed forever unable to be a good parent simply because he is physically handicapped. Like most stereotypes, this is both false and demeaning." Id. at 737, 598 P.2d at 42, 157 Cal. Rptr. at 389.

III. DOCUMENTATION OF THE REALITY OF DISABILITY-BASED EMPLOYMENT DISCRIMINATION

Employers, like other members of the general public, hold stereotypes and prejudices about disabled people that impede their ability to objectively evaluate the qualifications of disabled applicants and workers. Disabled people face discrimination in employment in a variety of ways. Many disabled people are excluded from the outset by medical requirements that screen out all people with specific disabilities or by inflated physical or other job requirements that bear no relationship to the successful performance of the job. Disabled people who are not completely excluded at the outset are often channeled into disability-stereotyped dead-end jobs or denied promotional opportunities. These discriminatory policies affect all disabled people, whether their disabilities are severe, moderate or perceived. The unemployment rate among persons with disabilities is staggering. While 88% of working-age men and 69% of working-age women are employed, only 33% of disabled working-age Americans work--only one disabled woman out of five and four disabled men out of ten have jobs.[13]

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[11] For a look at works which have utilized the socio-political definition of disability see Hahn, Disability and Rehabilitation Policy: Is Paternalistic Neglect Really Benign? (Book Review), 42 Pub. Ad. Rev. 385 (1982); Bowe, Rehabilitating America: Barriers to Disabled People (1978); Gliedman & Roth, supra p. 14; and Eisenberg, supra p. 12.

[12] See p. 11, infra

The presumption that these figures reflect the actual inability of disabled people to work is refuted by the many sociological, psychological and government studies that have documented that employment opportunities for disabled adults are severely impeded by misconceptions and generalizations about disabilities, unfounded fears about increased costs and decreased productivity,[14] and outright prejudice toward disabled people.

A recent report by the U.S. Advisory Commission on Intergovernmental Relations[15] stated:

> Probably the most significant barriers faced by persons with disabilities relate to the attitudes, predispositions, and behaviors of nondisabled persons. Such attitudes range from negative views of disability to discomfort in associating with people who experience some form of disability. The nature and extent of attitudes about disability have been documented through an extensive set of research studies conducted in many settings. One common finding is that nonhandicapped people tend to be preoccupied with disabling conditions and often incapable of seeing beyond these conditions to the whole person. Such predispositions lead

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[13] Jay Rocklin, President's Committee on Employment of the Handicapped, will provide additional statistical information on the participation of persons with disabilities in the workforce.

[14] The studies that address these concerns are discussed on pp. 17, 20, infra.

[15] Federal and State Government Compliance with Disability Rights Mandates: Policy Issues and Performance Contrasts, Oct. 14, 1988.

> nondisabled persons to overlook and ignore the full range of abilities possessed by persons with disabilities.
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> *****
>
> Researchers have shown that negative and discriminatory attitudes extend to the employment capabilities of disabled individuals. Both potential employers and coworkers have been shown to have negative views and expectations about the productivity and reliance of workers who experience some form of mental or physical disability. As Peter Jamero has noted, "employers, more often than not, appear more inclined to judge handicapped persons on the basis of disability rather than on what they are capable of performing." The reluctance of employers to hire persons with disabilities is rooted in common myths and misunderstandings, including the notions that the employment of disabled workers will increase insurance and worker compensation costs, lead to higher absenteeism, harm efficiency and productivity, and require expensive accommodations.
>
> These attitudes, common to many employers in the United States, have persisted despite empirical evidence from several quarters that disabled workers perform at levels equal to or superior to other employees. (Footnotes omitted).

The 1973 Rehabilitation Act authorized a needs study, which was reported to Congress in 1976, Urban Institute, Report of the Comprehensive Service Needs Study (1975) (herein cited as _Needs Study_). The _Needs Study_ summarized existing literature on employer attitudes as follows:

> Virtually all the studies on employer attitudes have found that large proportions of employers disfavor hiring disabled people. There are strong indications that these attitudes are in large part based on non-rational, negative feelings--prejudice, in other words. _Id_. at 324.

In keeping with the historical evolution of disability public policy, the _Needs Study_ recommended:

> a major shift in research and development emphasis toward a focus on the interaction of the individual and

> the barriers in the environment . . . . The major problems seem to be not so much with the severely handicapped, as with the severely handicapping environment. Id. at 818.

Hence, stereotypes and prejudices rather than handicaps themselves were viewed as the most potent barrier to equal employment opportunity.

While few people would openly admit to feelings of hostility towards disabled people, the persistence of deeply rooted prejudices has been well documented. In one study reported in the Needs Study, the author probed the attitudes of employers by asking them to rank various groups in terms of which ones they believed most employers would be more likely to hire. Colbert, Kalish & Chang, Two Psychological Portals of Entry for Disadvantaged Groups, 34:7 Rehab. Literature 194 (1973), cited in Needs Study at 314-15. The list included physically and mentally disabled groups, minority groups, controversial groups (student militants, prison parolees), old people and "neutral" groups (e.g. whites, Canadians). The study found that "physical disability groups were clustered together and ranked lower than all minority groups and old people and higher than all . . . mentally disabled groups." Id. at 315. Employers were more willing to hire student radicals or prison parolees than people who were either physically or mentally disabled. Id. This finding is consistent with a frequently cited study that found that all disabled groups were subject to prejudice and that personnel directors would prefer to hire a former prison inmate or mental hospital patient than an epileptic. Triandis & Patterson, Indices of Employer Prejudice Toward Disabled Applicants, 47 J. of Applied Psychology 52 (1963).[16]

Numerous studies have been conducted that conclude that disabled people are subject to the same type of prejudices and discrimination as members of racial and ethnic minorities. The earliest work in this area, Barker, the Social Psychology of Physical Disability, 4:4 J. of Soc. Issues 28 (1948), concluded that "the physically handicapped person is in a position not unlike that of the Negro, the Jew and other underprivileged racial and religious minorities; he is a member of an underprivileged minority." Id. at 31.[17] In a later study, Barker specifically reported that persons with various disabilities were unable to find adequate employment as a result of "irrational prejudice." Barker, Wright, Meyerson & Gonich, Adjustment to Physical Handicap and Illness: A Survey of the Social Psychology of Physique and Disability, 55 Bull. of the Soc. Science Research Council (1953).

Often reflective of the employer's own prejudices are the fears about the "reaction of others" to a disabled worker. In a survey reported in the Needs Study, employers were found to believe that paraplegics were best suited for jobs requiring a minimum of public contact. Employers feared the negative "reactions of others to the disability." Felton & Litman, Study of Employment of 222 Men with Spinal Cord Injury, 46 Archives of Physical Med. and Rehab. 809 (1965) cited in Needs Study at 321 n.32.[18]

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[16] See discussion of employer bias against epileptics on p. 14 infra.

[17] See also Cowen, Underberg & Verillo, The Development and Testing of an Attitudes to Blindness Scale, 48 J. of Soc. Psychology 297 (1958); Wright, Physical Disability--A Psychological Approach (1960); Safilios-Rothschild, The Sociology and Social Psychology of Disability and Rehabilitation III (1970).

This rationale for not hiring disabled workers persists today. In a recent case a doctor with multiple sclerosis was denied admission to a psychiatric residency program because the admissions committee feared the negative reactions of patients to his disability.[19] Pushkin v. Regents of the Univ. of Col., 658 F.2d 1372 (10th Circ. 1981). The 10th Circuit found these fears to be based on general stereotypes rather than any actual information about the disabled applicant. After evaluating the evidence, the 10th Circuit affirmed the district court's order directing the admission of the plaintiff to the residency program.

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[18] This response is reminiscent of "customer preference" cases brought under Title VII. See e.g. Diaz v. Pan American World Airways Inc., 442 F.2d 385 (5th Cir. 1971).

[19] Fears of the "reactions of others" have served to justify the exclusion of disabled people from many aspects of life. In 1971 one million handicapped children were excluded entirely from public school. 117 Cong. Rec. 45974 (1971). As stated by Congressman Vanick:

> [I]n the past, the reason for excluding these children from their right to an education has never been very clear . . . In one case a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates. Id.

Similarly, in 1972, Congressman Vanick commented on an airline rule that allowed carriers to "refuse transportation to 'crippled' persons on the grounds that they make passengers uncomfortable." 118 Cong. Rec. 11363 (1972).

The study referred to above on the attitudes toward and experiences with hiring paraplegics also found that most employers believed that paraplegics were best suited for non-professional jobs. This stereotype was directly contrary to the fact that paraplegics are actually found to be employed most frequently as professionals. Felton, supra p. 20, at 321.

In recent years, a new group of people with a disability has been the target of misconception and fears. People with Human Immunodeficiency Virus disease (which includes people infected with HIV, those who show some symptoms of the infection, and those with full-blown AIDS) have been the target of discrimination in employment. Despite the fact that such individuals wish to and can continue to work, they are often fired without any medical justification.

Often the image of what disabled people "should" do or can do has no basis in reality. Different stereotypes attach depending on the disability involved. See Himes, Measuring Social Distance in Relations with The Blind, 54 Outlook for the Blind 54 (1960). ("Each physical disability--deafness and crippleness as well as blindness--is significantly, though differently, stereotyped." Id. at 55.) Another study cited in the Needs Study indicated "that most employers would not consider people with most kinds of disabilities for production and sales jobs, but would for clerical and, to a lesser extent, managerial jobs; (and) that over 50% of the employers would never consider hiring a blind or mentally retarded person for any type of job . . ." Williams, Is Hiring the Handicapped Good Business, 38:2 J. of Rehab 30 (1972) cited in Needs Study at 312.

Discriminatory employer attitudes are manifested in a variety of ways. Most obvious is the continued use of medical standards that exclude all persons with particular disabilities from employment opportunities. The individual who has a disability that is exempted has no opportunity to prove his/her individual abilities to perform the job. Medical standards that are not formalized in writing are utilized in practice. Disabled people are rejected for employment as a result of pre-employment medical exams that merely reveal the existence of a disability without demonstrating any actual job-related limitation.

Although at least 85% of people with epilepsy have obtained control of their seizures, through medication, a significant number of employers flatly refuse to hire epileptics without any consideration of the effect the condition will have on safety and job performance.[20] Likewise, employers frequently refuse to hire persons who have cancer. A study performed in 1972 by the

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[20] See U.S. Dept. of Labor, D.O.L. Bull. No. 923, The Performance of Physically Impaired Workers in Manufacturing Industries, 116-117 (1948); Sands & Zalkind, Effects of an Educational Campaign to Change Employer Attitudes Toward Hiring Epileptics, 13 Epilepsia 87, 99 (1972).

California Division of the American Cancer Society concluded that most corporations and governmental agencies in that state discriminated in hiring against job applicants for an average period of five years after treatment for cancer.[21] The study revealed that this discrimination by employers stemmed from concerns that applicants with cancer, or a history of cancer, might not survive long enough to justify the training, that they might need extended periods of sick leave, and that they would cause increases in the cost of health insurance, workers compensation, and life insurance. Some employers believed that other employees would object to employees who were cancer victims because of the mistaken belief that cancer is contagious.

All of these reasons were proven false in a study performed in 1972 by the Metropolitan Life Insurance Company of its employees who were known to have had treatments for cancer. The study indicated that their work records were good relative to employees who had never had cancer. The conclusion was that hiring persons who have been treated for cancer for jobs for which they are qualified is sound industrial practice.[22] Hence, a significant percentage of persons who have had treatment for cancer suffer unjustifiable and discriminatory loss of job opportunities.

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[21] R. McKenna, Employability and Insurability of the Cancer Patient, 2-3 (Nov. 25, 1974).

[22] Wheatley, Cunnick, Wright & Van Keuren, The Employment of Persons With a History of Treatment for Cancer, 33 Cancer 441, 445 (1974).

Many employers require applicants to have back x-rays taken, and then disqualify anyone whose results are abnormal. However, studies show that there is no difference between the incidence of low back pain in groups with low back abnormalities discoverable by x-ray and groups without such abnormalities.[23] Hence, many qualified persons with abnormal back x-rays are unnecessarily precluded from working.

Seemingly more objective, but no less discriminatory, are job "requirements" that in fact bear no relation to the successful performance of the job. Moreover, "employers frequently underestimate the capabilities of disabled workers" to perform legitimate job functions. Nagi, Work, Employment & the Disabled, 31 Am.J. Econ. Soc. 21 (1972), cited in Needs Study at 314.[24]

The Needs Study cited two pioneering studies that confirm that private employers, as well as state and local governments, utilize job "requirements" that bear no relationship to the successful performance of the job. Viscardi, The Adaptability of Disabled Workers, 2:3 Rehab. Rec. 3 (1981), cited in Needs Study at 326 n.45; Greenleigh Associates, Inc., A Study to Develop a Model for Employment Services for the Handicapped (1969), cited in Needs Study at 326 n.46. Examples given are requiring employees to stand up for jobs that "can just as easily--or more easily--be performed sitting down" and requiring the "taking of written civil service tests that mentally retarded people cannot pass for jobs that they are capable of performing." Id. at 326. The Needs Study also reported a situation where "workers suffering upper limb amputations on the job were retained after a job analysis performed by the union involved discovered that, contrary to popular belief, over 80 percent of the work required on the job did not require the use of both arms." Id. at 804.

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[23] Rockey, Fantel, Omenn, Discriminatory Aspects of Pre-employment Screening: Low Back X-ray Examinations in the Railroad Industry, 5 Am. J. of Law & Med. 197, 202 (1979).

[24] The use of stereotypes about the physical abilities of women are analogous to the stereotypes about disabled people. For example, Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969), involved a regulation that prohibited women from lifting over 30 pounds. The court overruled the regulation because it was based on general presumptions instead of individual ability. See also LeBlanc v. Southern Bell Telephone & Telegraph Co., 333 F.Sup. 602 (E.D. La., 1971), aff'd, 460 F.D 1229 (5th Car. 1972) cert. denied, 409 U.S. 990 (1972); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Car. 1971).

Outmoded stereotypes whether manifested in medical or other job "requirements" that are unrelated to the successful performance of the job, or in decisions based on the generalized perceptions of supervisors and hiring personnel, have excluded many disabled people from jobs for which they are qualified. The function of anti-discrimination laws is to assure that decisions are made based on individual merit.

Employers often attempt to justify the rejection of disabled applicants by claiming that hiring disabled workers will cause decreased productivity and safety, and increased absenteeism and costs. An examination of the literature on the actual performance of disabled workers reveals the fallacies those rationalizations contain.

According to the Needs Study, the best and most comprehensive study of the job performance of disabled workers was conducted by the Bureau of Labor Statistics, U.S. Dept. of Labor, and appears in Bull. No. 923, The Performance of Physically Impaired Workers in Manufacturing Industries (1948), cited in Needs Study at 318. In this comprehensive study Department staff examined the employment records of 11,000 disabled and 18,000 carefully matched non-disabled workers in manufacturing plants throughout the country. Data on productivity, absenteeism, nondisabling injuries, disabling injuries and quits were abstracted. Company records rather than supervisors' impressions were the data source. For each disabled worker, one to three non-disabled workers were matched, not only for sex, age, and occupation but also for plant, shift, and particular job within the same plant and shift.

As reported in the Needs Study:

> The most important finding was that differences between impaired and unimpaired workers in any of the performance categories measured were slight . . . . Impaired workers had significantly higher involuntary termination (firing) rates. The authors attribute this to postwar practice of firing disabled workers to hire returning (able-bodied) war veterans . . . . One of the conclusions that the authors draw is that the physically impaired worker is not necessarily a handicapped worker. The results of this major study are strong evidence that employers' fears of low performance rates among disabled workers are

unjustified. (emphasis added) Id. at 318-19.[25]

Interestingly, the authors found that many of the manufacturing plants surveyed reinstated policies against hiring disabled workers after having relaxed such policies during the war years. See Needs Study at 296-97. The reinstatement of exclusionary policies, despite the positive employment records of disabled workers, is strong evidence that these standards are not related either to functional skill or ability required for job performance or to a concern for the safety of workers.

Other government studies have also found that handicapped workers performed as well as, or better than, their non-handicapped co-workers. U.S. Bureau of Labor Standards, Dept. of Labor, Bull. No. 122, Proceedings of the National Conference on Workmen's Compensation & Rehabilitation 19 (1950). All studies on the subject support the fact that disabled workers have as good as or better safety records than non-disabled workers. U.S. Dept. of Labor, Bull. No. 122 at 8.[26] Government studies have also concluded that the employment of handicapped persons does not affect the premium rates either for non-occupational benefit plans or for workers' compensation. U.S. Bureau of Labor Standards, Dept. of Labor Bull. No. 234 at 10.[27]

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[25] For example, the study specifically stated:
The data suggest that. . . an orthopedic impairment left more abilities than it took away. A man who has lost an arm was not necessarily incapable of performing jobs that required the use of two hands. Nor. . . did the survey indicate that the worker who had lost a leg necessarily had to be confined to sedentary occupations. . . . Men who had lost a hand were found engaged in machine operations or in handling materials; and workers who had lost a leg were engaged in work requiring considerable walking and moving about. Bureau of Labor Statistics, Bull. No. 923, supra p. 27, at 59.

[26] See also Pati and Gopal, Countdown on Hiring the Handicapped, 57:3 Personnel J. 144 (1978); Ellner & Bender, Hiring the Handicapped (1980); Kalaenik, Myths About Hiring the Physically Handicapped, The Ca. Governor's Comm. for Employment

Over the last twenty-five years the Dupont Corporation has conducted a number of studies on the performance of its handicapped employees. The most recent report, E. I. DuPont de Nemours & Co., Equal to the Task (1981) (DuPont Survey of Employment of the Handicapped), concluded "Dupont studies over a period of twenty-five years have shown that the performance of handicapped employees is equivalent to that of their unimpaired co-workers. In safety, job duties and attendance, the handicapped hold their own." Id. at 4.

IV. THE REHABILITATION ACT MODEL

The anti-discrimination in employment sections of the ADA are modelled after Section 504 of the 1973 Rehabilitation Act. The primary difference in the ADA and Section 504 is scope, not content. While Section 504 applies only to recipients of federal funds, the ADA would extend employment coverage to all entities covered by Title VII of the 1964 Civil Rights Act. The purpose is simple--to complete the commitment begun in 1973 to extend to Americans with disabilities the same protections against

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of the Handicapped, A Blueprint for Action (1980).

[27] See also National Institutes on Rehabilitation and Health Services, Report of the National Workshop on Rehabilitation and Workmen's Compensation 105 (1971.

discrimination as that afforded other minorities and women.

The statutory framework is designed to ensure that persons with disabilities are treated as individuals and that employment decisions are not made on the basis of stereotypes about certain disabilities. Only those individuals who are qualified to perform the job in question are protected. Hence, employers are not required to employ an unqualified individual simply because he or she has a disability.

Section 201(5) of the ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The term "reasonable accommodation" is a term of art from the Section 504 regulations. The ADA also incorporates the Section 504 limitation on reasonable accommodation, which is that of "undue hardship." Section 202(b)(1) states that the term discrimination includes the failure to make reasonable accommodation unless the covered entity "can demonstrate that the accommodation would impose an undue hardship on the operation of its business." The Section 504 regulations establish a context for determining whether an accommodation is reasonable or poses an undue hardship. The relevant section, 45 C.F.R. section 84.12, provides:

> (b) Reasonable accommodation may include (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other

> similar actions.
>
> (c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:
>
> (1) The overall size of the recipient's program with respect to number of employee, number and type of facilities, and size of budget;
>
> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce, and
>
> (3) The nature and cost of the accommodation needed.

Hence, reasonable accommodation is a flexible standard that balances the rights of the applicant or employee with the employer's legitimate business interests. The determination of undue hardship must therefore be made on an individual basis. As explained in the "Analysis of the Final Regulation," 42 Fed. Reg. 22685, 22688 (1977):

> Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

In determining whether an individual is qualified under the ADA, an employer may not use selection criteria that identify or limit persons with disabilities unless the criteria can be shown by the covered entity to be necessary and related to the ability of an individual to perform the essential functions of the particular employment position. Sec. 202(b)(3). As stated in the Section 504 Analysis, supra at 22688, "[t]his paragraph is an application of the principle established under Title VII of the Civil Rights Act of 1964 in Griggs v. Duke Power Company, 401 U.S. 494 (1971)." It is well accepted under Title VII that selection procedures that have a disparate impact on racial minorities and women must be necessary to safe and efficient job performance. The ADA extends that protection to persons with disabilities who, as demonstrated earlier, are often subject to disqualifying physical or mental criteria that bear no relationship to job performance.

To assure that qualified applicants are not excluded because of a physical or mental condition, it is critical that the selection procedure not included pre-employment inquires that serve solely to identify a person's disability. It has been common practice for pre-employment questionnaires to include sweeping questions such as: do you have any physical defect; have you ever been treated for mental illness; have you ever been hospitalized; do you ever experience seizures. These types of intrusive inquiries identify a person's disability without serving any legitimate job-related purpose. In order to insure that improper bias does not enter into the selection process, it is critical to limit employers' inquires to those that evaluate a person's ability to perform job-related functions. As explained in the Section 504 Regulations, Analysis, supra, 42 Fed. Reg. at 22689, "an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license." This type of procedure assures that subjective stereotyping about disabling conditions, which as shown above is prevalent, does not enter into the determination of whether an applicant is qualified for the job.

As in Section 504 and Title VII, the ADA's non-discrimination provisions extend to "job application procedures, the hiring or discharge of employees, employee compensation, advancement, job training, and other terms, conditions and privileges of employment. Sec. 202(a).

In order to provide uniform enforcement procedures, the ADA makes the EEOC the enforcing agency. It is expected that the EEOC and other federal agencies with jurisdiction over the employment practices of private employers will work cooperatively to enforce the anti-discrimination provisions. This has been done in instances where there is over-lapping jurisdiction in employment discrimination cases under Title VI, Title VII, Title IX and Executive Order 11246. Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance, 28 C.F.R. 42.601-613 (January 25, 1983). Both the Office of Civil Rights and the Office of Federal Contract Compliance refer individual cases of employment discrimination to the EEOC.

Finally, under the ADA a private right of action is available and the remedies of Title VII and 42 U.S.C. section 1981 are available, as in race and national origin employment cases. Section 1981 damages are limited to cases of intentional discrimination. Punitive damages require a showing that the defendant acted "wantonly, maliciously or in bad faith." Section 605 of the ADA allows for attorney's fees to the prevailing party. This provision has long been recognized as essential to the right of protected groups, in order to fully utilize anti-discrimination statutes. As Senator Cranston stated when enacting the attorney's fees provision in the 1978 Amendments to Title VII, "a right without a remedy is no right at all."

V. The Anti-Discrimination in Employment Sections of the Rehabilitation Act Have Created Workable Standards Which Take Into Consideration the Rights of Workers With Disabilities and the Business Interests of Employers

A review of the case law prohibiting employment discrimination under the 1973 Rehabilitation Act provisions demonstrates a reasoned approach that considers both the rights of workers with disabilities and the business interests of employers. The cases also illustrate the drastic need for anti-discrimination provisions to assure that people with disabilities who are qualified to work are not forced onto the welfare rolls by employer ignorance and prejudice.

The threshold jurisdictional issue in Section 504 cases, as in the ADA, is whether a person is "handicapped" or "disabled."[28] The U.S. Supreme Court's seminal decision on this issue is School Board of Nassau County v. Arline, 107 S.Ct. 1123 (1987). In that case the court was called upon to interpret the Rehabilitation Act definition of "handicapped" person, which is identical to that contained in the ADA. The term includes an individual who (i) has a physical or mental impairment, which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

The Arline Court stated that this definition:

> . . . reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice but from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.' "...[t]o combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of 'handicapped individual' so as to preclude discrimination against 'a person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"
>
> *****
>
> By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual

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[28] The definition of persons with disabilities in the ADA is not intended to be substantively different than the definition of "handicapped person" in Section 504. The substitution of disabilities for handicaps merely reflects a preference in terminology.

impairment.[29]

Since Arline, the Congress has adopted language that recognizes coverage of persons with contagious diseases and incorporates "direct threat to others" as a legitimate qualification standard. [See Civil Rights Restoration Act of 1987; Fair Housing Act Amendments of 1988 (not limited to contagious diseases)]. The ADA also adopts this approach. Sec. 101(b)(2)(B) states:

> The term qualification standard may include (B) requiring than an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the workplace or program.[30]

As is true with contagious diseases, a review of the case law shows that the legitimate concerns of employers are taken into account in all types of cases. However, it is also clear that many employers utilize outmoded job criteria that screen out qualified workers. The employer always has the opportunity to show that the criteria are job related and are consistent with business necessity and the safe performance of the job. If such a showing is made, the disabled person is disqualified unless alternative criteria that do not have an adverse impact would also meet legitimate business interests. The requirement of reasonable accommodation has also resulted in the employment of qualified persons with disabilities without compromising legitimate business interests. Finally, the case law reveals that persons with disabilities are still subject to outright prejudice and ignorance based on unfounded stereotypes. Clearly, employers have no legitimate interest in failing to employ on that basis.

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[29] The specific question in Arline was whether a person with a contagious disease could be considered a person with a handicap under the Act. The Court held in the affirmative stating that an exclusion for contagious diseases "would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they are 'otherwise qualified.'" After Arline, the Department of Justice issued an opinion that persons with HIV-infection are covered by the Act. As stated above, this conclusion has been endorsed by Congress.

[30] Sec. 101(b)(2)(A) states that a qualification standard may include "requiring that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property of the safety of others in the workplace. This provision was originally included in the 1978 Amendments to Section 504. This type of provision is also included in the CRRA and the FHAA (not limited to drugs or alcohol).

Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981), illustrates the pervasive use of stereotypes to deny qualified persons with disabilities employment opportunities. In that case a physician who had multiple sclerosis sought and was denied admission to the University's Psychiatric Residency Program. The Tenth Circuit agreed with the district court's determination that Dr. Pushkin was an otherwise qualified individual who had been rejected solely on the basis of his handicap, in violation of the Rehabilitation Act.

The evidence presented at trial indicated that the defendant had made the following assumptions about Dr. Pushkin: (1) that he was angry and emotionally upset due to his handicap, and would thus be unable to do an effective job as a psychiatrist, (2) that he had difficulties with mentation, delirium and disturbed sensorium due to the MS and steroid use, (3) that his handicap would render him unable to handle the workload, and (4) that he would miss too much time away from work.

At trial the district court found that these assumptions were rebutted by evidence of Dr. Pushkin's past competence in dealing with his condition, and by witnesses' testimony that his emotional responses were normal and that he treated patients appropriately.

The Tenth Circuit affirmed the finding that the University's reasons for rejecting Dr. Pushkin "were based on incorrect assumptions or inadequate factual grounds." Id. at 1383. The appellate court opined that handicap discrimination usually results from "invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped person." Id. at 1385. In this case, the University's actions were not "predicated on any known deficiency of Dr. Pushkin himself" but based on a general knowledge of MS that did not apply to Dr. Pushkin, the individual.

Likewise in Smith v. Fletcher, 393 F.Supp. 1366 (S.D. Tex. 1975), modified, 559 F.2d 1014 (5th Cir. 1977), a paraplegic who had a Master's degree in physiology was assigned menial clerical tasks because her supervisor had made "an arbitrary and unfounded decision as to her physical capabilities." The court ordered that she be promoted from a GS-9 to a GS-13.

Strathie v. Department of Transportation, 716 F.2d 227 (3rd Cir. 1983), illustrates that strict adherence to outmoded physical requirements serves to exclude qualified disabled employees. In that case, a hearing impaired person sought a position as a public school bus driver. He was denied the necessary driver's license on the grounds that he could not meet the Department of Transportation regulation requiring a specified level of hearing without the use of a hearing aid. With a hearing aid Mr. Strathie met the Department's standards.

The district court held that the regulation was valid and that Mr. Strathie was not therefore an "otherwise qualified" handicapped individual under the Rehabilitation Act. In support of this decision the court accepted defendant's arguments that the accommodation of a hearing aid was unreasonable because of the risks of dislodgement, mechanical failure, inability to localize sound, and the possibility that the wearer would lower the volume of the aid and thus decrease its usefulness.

The Third Circuit reversed, noting that the district court had failed to consider Mr. Strathie's proposed modifications that would reduce the risks. The modifications included frequent inspections of the aid and carrying a spare aid and batteries to minimize mechanical failures, pre-setting volume to avoid variability, and individualized assessment of ability to localize sound. With respect to the risk of dislodgement, the court noted that certain types of hearing aids are "less likely to become dislodged than are regular eyeglasses." The court emphasized that it was anomalous for the Department to allow vision standards to be met with corrective lenses, yet did not allow candidates to meet hearing requirements with the help of a hearing aid. The opinion as a whole highlighted the need to address the realities of a given individual's situation, instead of relying on overly broad general assumptions.

The need for individualized determination under Section 504 with respect to the qualifications of persons with disabilities was also emphasized by the court in Jackson v. State of Maine, 544 A.2d 291 (Me. 1988). Mr. Jackson was an insulin-controlled diabetic who was prevented from taking the examination for public school bus driver on the basis of a regulation requiring him to be "free from...diabetes". Id. at 298. The Court noted that the denial of plaintiff's application "was automatic and based solely on his diabetes." Defendants offered no evidence that Mr. Jackson, as an individual, could not safely drive a school bus. The doctor who examined him concluded that he was "free from any condition that might affect his ability to safely operate a school bus." Moreover, at the time of the appeal Mr. Jackson was working successfully as a bus driver.

In Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983), the Eleventh Circuit found that the use of a written test as the sole criterion for a job as an equipment operator discriminated against Mr. Stutts, who had dyslexia (a learning disability).

Nelson v. Thornburgh, 567 F.Supp. 369 (E.D.Pa. 1983), illustrates the importance of reasonable accommodation to maintain qualified disabled workers and the flexible approach taken by courts when considering the burden on defendants. Thounburgh involved blind income maintenance workers who alleged that the Department of Public Welfare had unlawfully discriminated against them, failing to accommodate their disability by providing part-time readers. The employees themselves had hired readers, and with the assistance of these readers were able to perform the job as well as their sighted colleagues. The court held that inability to read did not mean that the employees were not "otherwise qualified," as this was not essential to successfully meeting the requirements of the position. Several accommodations, including brailling forms and manuals, and using technology like a Versabraille, and possible schedule changes to make the most efficient use of readers, would insure that employees were able to function on the job.

The court acknowledged that "accommodation...will impose some further dollar burden upon an already overtaxed system of delivery of welfare benefits", but noted that "the additional dollar burden is a minute fraction of the DPW/PCBA personnel budgets." Moreover, the court emphasized that the failure to accommodate in the workplace would impose very real costs on American society and the American economy, in light of the consequence of having to support these employees on government benefits if they were not allowed to contribute their productivity as members of the workforce.

Finally, Chalk v. United States District Court Central

District of California, 840 F.2d 701 (9th Cir. 1988), illustrates how irrational fear of contagion can serve to deny a qualified disabled person his profession, unless court review is available. In that case Mr. Chalk, a certified teacher of hearing-impaired students, was barred from teaching after a diagnosis of AIDS. The Ninth Circuit reviewed all relevant medical literature and concluded that there was no significant risk of transmission in the classroom setting. Among the cited literature was a Surgeon General's Report that stated, "casual social contact between children and persons infected with the AIDS virus is not dangerous." The Court stated that "the basic purpose of Section 504 is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudicial attitudes or ignorance of others." The court therefore granted an injunction allowing Chalk back into his classroom position.

VI. REPORTS OF EMPLOYERS HAVE BEEN POSITIVE

Reports from employers demonstrate that many of the fears associated with passage of the Rehabilitation Act anti-discrimination provisions were unfounded. In addition to the studies that refute employers fears about productivity, absenteeism and safety,[31] a comprehensive study by the Department of Labor regarding accommodations to disabled employees by federal contractors demonstrates that accommodations that allow participation can often be done without great expense.[32] Almost one-forth of the disabled employees in the study received some type of accommodation. Over fifty percent of the accommodations in the study cost nothing; an additional thirty percent cost less than $500; only eight percent cost more than $2000. The experience of providing accommodations was positive for employers. The report stated that "accommodation is seen by firms as sensible business practice to secure a reliable worker with needed skills, akin to the provision of tools or other aids to non-disabled workers to increase their productivity".

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[31] See, discussion, supra, pp. 17-20

The Wall Street Journal reported on the change in federal contractor employer practices under Section 503 as early as January, 1976. More than 275,000 companies employing more than one-third of the work force were affected at that time.[33] As a result of Section 503, companies reviewed their hiring practices. The Wall Street Journal article provides interesting anecdotal evidence of the positive effect of the non-discrimination provisions on a number of major American enterprises:

> "We had a medical department that thought it was saving the company money by only hiring Greek gods," says a personnel officer for a large Midwestern manufacturing firm. "We have completely abandoned that approach." Now, he adds, "we're trying to fit a person

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[32] "A Study of Accommodations Provided to Handicapped Employees by Federal Contractors," Executive Summary, U.S. Department of Labor, June 1982.

[33] Unfortunately, the courts have not recognized a private cause of action under Section 503 and agency action has been hampered by back-logs and limited enforcement. Hearings before the Subcommittee on Employment Opportunities of the House Committee on Education & Labor, 96th Cong., 1st Sess., 25 (1979).

to a particular job." The company, for example, has begun considering applications from the deaf.

GTE Sylvania has changed more than its attitude toward former cancer patients. The company used to have rigid weight limits for all jobs. "We've thrown all those out the window," says John McKeith, who handles industrial relations.

International Telephone & Telegraph Corp. has scraped rules that barred applicants with epilepsy, cancer and some other health problems. An epileptic has been hired as a packer for an ITT subsidiary.

Bell Helicopter Co. of Fort Worth, Texas, became the target of a Section 503 complaint when it turned a man down for a position as a contract analyst. He had spinal curvature and it was corporate policy "not to hire anyone with a bad back," says Jim Kight, a Labor Department specialist in Dallas. The complaint was resolved when Bell changed corporate physicians - which, Mr. Kight says, was "the same thing as changing its policies."

Written tests, too, are sometimes being modified. In Chicago, officials at Continental Illinois National Bank & Trust Co. quickly devised a braille version of its computer-programming aptitude test because they feared that a blind applicant was about to complain under the federal law. He got the job.

For some firms, the new attack on job discrimination has altered stereotypes rather than formal hiring practices. In the past, says one personnel executive, "we were tempted to say, 'This girl can't type; she's blind.' We had preconceived notions." Now, [business] concerns are starting to explore their whole range of jobs, finding ways that disabled employes [sic] might perform them with minor changes in hours or duties.

Thus, Union Carbide Corp. is advertising sales-representative job openings in handicapped groups' newspapers, merely specifying that "car maneuverability" is required. U.S. Steel did recruiting last spring at the National Technical Institute for the Deaf, in Rochester, N.Y.; it was the school's first such visit in its seven-year history.

And in 1974, Sears, Roebuck & Co. hired Brad Shorser as its first blind management trainee despite a few officials' misgivings about his ability to deal

> with customers. Now a successful assistant customer-service manager for the Hichsville, N.Y., store, 28-year-old Mr. Shorser says the federal law's existence "most definitely" helped him get the job.

Seven years later the Wall Street Journal again highlighted the advantages of employing persons with disabilities pursuant to non-discrimination provisions. The article, which appeared on November 22, 1983, noted that "[w]ork accommodations for the disabled often cost little and benefit others." It observed that a poll of 2,000 federal contractors found that "81% of changes made cost $500 or less." Moreover, modifications often helped able-bodied workers as well. For example, in addition to providing wheelchair access, "[w]idened doorways at Western Electric allow easier moves of heavy equipment. Scientific Atlanta likes its enlarged elevators for similar reasons." And the benefits are not limited to improved physical arrangements. "when Tektronic altered an assembly line supervisor's tasks to aid a mentally retarded man, all 12 workers' output rose and errors fell."

VII. A Uniform Federal Law Is Necessary to Protect Persons With Disabilities Who Are Qualified To Work From Discrimination

While 44 states have passed laws prohibiting employment discrimination against persons with disabilities, only twelve are comparable to the Rehabilitation Act in providing protections against discriminatory practices.[34] This demonstrates how unprotected persons with disabilities are from private employment discrimination. Persons with disabilities are now the only major group that, while recognized by Congress as face widespread discrimination in employment, still has no adequate federal protection. Until the ADA is passed, Americans with disabilities will continue to be kept out of the workforce because of stereotypes and ignorance.

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[34] Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help? 40 Arkansas Law Review, pp. 261, 322. (Five additional states prohibit state agencies and recipients of state funds from discriminating. (Only Delaware and Wyoming have passed no

The state statutes provide for coverage of private employers, at least to the extent of Title VII. The majority do not limit coverage to moderate sized employers as in Title VII. Hence, restrictions on the right of private employers to exclude disabled workers is not new to the ADA. However, the state laws vary widely, and do not provide as much protection as the Rehabilitation Act once the primary hurdle of coverage is overcome.

One major problem is the failure of many state statutes to cover mental disabilities. In addition, many state statutes have very restrictive definitions of "handicap." Many define handicap as a limitation on work. This type of definition gives rise to the anomalous result that a person whose disability was the cause of the adverse employment decision but does not affect the ability to work is not protected against employment discrimination. The same anomaly results when statutes cover only severe handicaps. Others list specific handicaps leaving

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legislation at all.)

all other subject to arbitrary employment practices. For example, New Hampshire excludes handicaps caused by illness and Arizona excludes handicaps that were first manifested after age 18. Many statutes require a presently disabling condition despite the fact the employers often use signs of a future disabling condition to disqualify an employee. It is estimated that between 150,000 and 1.2 million pre-employment lower back x-rays are given each year. Despite the fact that they have been totally discredited in the scientific literature, they are still widely used to screen out asymptomatic applicants.[35] Hawaii actually limits coverage to impairments which will last a lifetime without substantial improvement. Hence, a person with cancer may be excluded just because he may get better.

Over one-half of the states do impose a reasonable accommodation requirement. However, several define the term restrictively. In Minnesota, a $50 cap is provided. Many restrict the requirement to employers of over a certain number. This makes no sense, when the accommodation may involve simple readjustments of work space (lowering a desk). With the undue burden protection of federal law, there is no reason to exempt employers or limit the type of accommodation which can be made. Finally, nearly one-half of the states do not require any reasonable accommodation despite extensive documentation that accommodations are most often not costly.[36] Yet for many disabled people the willingness to accommodate can make the difference between fruitful employment and welfare.

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[35] Id. at 288.

Now is the time for Congress to make a national commitment to the equal employment opportunities of persons with disabilities. The federal law is too limited in coverage and state laws vary widely and are often too restrictive. The result is the sanctioning of widespread proven employer bias and the exclusion of millions of Americans from jobs that they can perform and deserve to hold.

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[36] Dupont study, supra, Wall Street Journal, Nov. 22, 1983, at 1 col. 4.

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

SEP 27 1988

Memorandum for Arthur B. Culvahouse, Jr.
Counsel to the President

Re: Application of Section 504 of the
Rehabilitation Act to HIV-Infected Individuals

Introduction and Summary

This memorandum responds to your request for an opinion on the application of section 504 of the Rehabilitation Act of 1973 (Act), 29 U.S.C. 794, to individuals who are infected with the Human Immunodeficiency Virus ("HIV" or "AIDS virus"). You specifically asked us to consider this subject in light of School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987) (Arline). Congress has also sought to clarify the law in this area by amending the Rehabilitation Act to address directly the situation of contagious diseases and infections in the employment context. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31 (1988) (Civil Rights Restoration Act). Although your opinion request was limited to the application of section 504 in the employment context, we have also considered the non-employment context because the President has directed the Department of Justice to review all existing federal anti-discrimination law applicable in the HIV infection context and to make recommendations with respect to possible new legislation.[1] See Memorandum for the Attorney General from President Ronald Reagan (Aug. 5, 1988).

For the reasons stated below, we have concluded, with respect to the non-employment context, that section 504 protects symptomatic and asymptomatic HIV-infected individuals[2] against discrimination in any covered program or activity on the basis of an actual, past or perceived effect of HIV infection that substantially limits any major life activity[3] -- so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in Arline. We have further concluded that section 504 is similarly applicable in the employment context, except for the fact that the Civil Rights Restoration Act replaced the Arline "otherwise qualified" standard with a slightly different statutory formulation. We believe this formulation leads to a result substantively identical to that reached in the non-employment context: namely, that an HIV-infected individual is only protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.[4]

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[1] We defer to others in the Department to make the policy determinations necessary to recommend legislation, and, in keeping with the tradition of this Office, confine our analysis to matters of legal interpretation.

[2] In this opinion, individuals who are infected with the AIDS virus and have developed the clinical symptoms known as Acquired Immune Deficiency Syndrome ("AIDS") or AIDS-Related Complex ("ARC") will sometimes be referred to as "symptomatic HIV-infected individuals." Individuals who are infected with the
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[2](...continued) AIDS virus but do not have AIDS or ARC will sometimes be referred to as "asymptomatic HIV-infected individuals." References to AIDS should be understood to include ARC, except where a distinction between the two is expressly drawn. Finally, where we intend to refer to all HIV-infected individuals, whether symptomatic or not, we either refer to "HIV-infected individuals" or to "HIV infection" (without any "symptomatic" or "asymptomatic" modifier) or clearly indicate in the text that the discussion refers to both categories.

[3] The medical information available to us indicates that HIV infection is a physical impairment which in a given case may substantially limit a person's major life activities. See infra at 6-11. In addition, others may regard an HIV-infected person as being so impaired. See infra at 12-13. Either element in a given case, we believe, would be sufficient for a court to conclude that an HIV-infected person is an "individual with handicaps" within the terms of the Act. By virtue of the fact that the handicap here, HIV infection, gives rise both to disabling physical symptoms and to contagiousness, it is unnecessary to resolve with respect to any other infection or condition which gives rise to contagiousness alone whether that singular fact could render a person handicapped. In other words, the medical information available to us undermines the accuracy of the assumption or contention referenced in Arline that carriers of the AIDS virus are without physical impairment. 107 S. Ct. at 1128 n.7.

[4] These conclusions differ from, and supersede to the extent of the difference, a June 20, 1986 opinion from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, for Ronald E. Robertson, General Counsel, Department of Health and (continued...)

I. Statutory Framework Under Section 504

Section 504 was intended to proscribe discrimination against the handicapped in programs or activities that are conducted by federal agencies or that receive federal funds. In relevant part, the statute provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794.[5]

There are two definitions of "individual with handicaps," one or both of which may be applicable to HIV-infected

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[4] (...continued) Human Services (Cooper Opinion). The conclusions herein incorporate subsequent legal developments (the Supreme Court's decision in Arline and Congress' passage of the Civil Rights Restoration Act) and subsequent medical clarification (see July 29, 1988 letter from C. Everett Koop, M.D., Surgeon General, to Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel (Koop Letter) (attached).

[5] Section 504 thus has five elements. First, an individual claiming discriminatory treatment must be an "individual with handicaps," as defined in the Act. Second, the individual must be "otherwise qualified" for the benefit or program participation being sought. Third, the individual must be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under a covered program or activity. Fourth, the contested treatment must be "solely by reason of . . . handicap." And fifth, the discrimination must occur in a program or activity conducted or funded by the federal government.

The definition of "program or activity" is set forth in a new section 504(b), which was added by section 4 of the Civil Rights Restoration Act. In general, the term is to be given an institution-wide scope rather than the program- or activity-specific scope called for by Grove City College v. Bell, 465 U.S. 555 (1984). Grove City was superseded by the Civil Rights Restoration Act. See sec. 2, Pub. L. No. 100-259.

individuals depending upon the context in which the discrimination occurs. The generally-applicable definition is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B). Thus, an individual can qualify as handicapped under the general definition if he actually suffers from a disabling impairment, has recovered from a previous such condition, was previously misclassified as having such a condition, or is regarded as having such a condition, whether or not he actually has it.

The Civil Rights Restoration Act amended the definitions section of the Rehabilitation Act to provide, in the employment context, a qualification of the definition of an "individual with handicaps" with respect to contagious diseases and infections. This provision qualifies rather than supplants the general definition of "individual with handicaps".[6] The amendment provides as follows:

> For the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31-32 (1988).

II. Application of Section 504 in Contexts Other Than Employment

Section 504, as interpreted by the Supreme Court in Arline, has two primary elements: the definition of "individual with handicaps" and the "otherwise qualified" requirement. We will first determine whether in the non-employment context an HIV-infected individual, whether symptomatic or asymptomatic, is an "individual with handicaps," and then discuss the application of the "otherwise qualified" requirement to such an individual.[7]

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[6] The Civil Rights Restoration Act amended 29 U.S.C. 706(8) to add the qualification as a new subparagraph (C), to follow subparagraph (B), which contains the generally-applicable definition of "individual with handicaps." The new subparagraph thus constitutes a specific qualification of the preceding general definition. The qualification operates in the same way as the qualification Congress enacted in 1978 with respect to alcohol and drug abuse, on which the contagious disease provision was modeled. See note 19, infra, and accompanying text. Both provisions are structured as exclusions from the general definition. The natural implication of both statutory exclusions is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section.

A. Symptomatic HIV-Infected Individuals

As discussed below, Arline requires the conclusion that persons with AIDS (i.e., symptomatic HIV-infected individuals) are within the section 504 definition of handicapped individual notwithstanding their contagiousness. Contagiousness, by itself, does not obviate the existence of a handicap for purposes of section 504. Arline, 107 U.S. at 1128.

Arline involved an elementary school teacher who had been discharged after suffering a third relapse of tuberculosis within two years. All parties conceded, and the Court found, that the plaintiff was handicapped because her tuberculosis had adversely affected her respiratory system, requiring hospitalization. Id. at 1127-1128. Plaintiff's respiratory ailment thus was a physical impairment that substantially limited one of her major life activities. Id. The Court concluded that the defendant's action came within the coverage of section 504, notwithstanding the fact that Ms. Arline was dismissed not because of any disabling effects of her tuberculosis but because of her employer's fear that her contagiousness threatened the health of her students. The Court concluded that "the fact that a person with a record of physical impairment is also contagious does not suffice to remove that person from coverage under § 504." Id. at 1130 (emphasis added).

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[7] Arline was also concerned with a third element: namely, whether the contagiousness of a handicapped individual covered by the Act could be used as a justification for discrimination against that individual. Subject to the "otherwise qualified" limitation, the Court held that contagiousness cannot be used for this purpose. The Court stated: "We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant. . . . It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." Arline, 107 S. Ct. at 1128. In light of the Court's holding, we conclude that the contagiousness of an HIV-infected individual cannot be relied upon to remove that individual from the coverage of the Act. Contra Cooper Opinion at 27 and n.70.

We believe that symptomatic HIV-infected individuals are handicapped under section 504. For these individuals, the disease has progressed to the point where the immune system has been sufficiently weakened that a disease such as cancer or pneumonia has developed, and as a result, the individual is diagnosed as having clinical AIDS. Because of the substantial limiting effects these clinical symptoms have on major life activities, such a person is an "individual with handicaps" for purposes of section 504. This same conclusion should also apply to a person with ARC, who also has serious disabling physical effects caused by HIV infection, although the physical symptoms are not the particular diseases that the Centers for Disease Control have included in its list of the clinical symptoms that constitute AIDS. As with the tuberculosis that afflicted Ms. Arline, AIDS (or ARC) is often "serious enough to require hospitalization, a fact more than sufficient [in itself] to establish that one or more . . . major life activities [are] substantially limited . . . ." Id. at 1127. Therefore, assuming they are otherwise qualified, contagiousness does not excuse or justify discrimination against individuals handicapped by symptomatic HIV infection. As will be seen, the consideration of the "otherwise qualified" standard allows for a reasonable determination of whether contagiousness threatens the health or safety of others or job performance, and in those events, permits the exclusion of the individual from the covered program or activity.

B. Asymptomatic HIV-Infected Individuals

Arline did not resolve the application of section 504 to asymptomatic HIV-infected individuals.[8] The Court left open the question of whether such individuals are "individuals with handicaps" under section 504, a question which turns on whether an asymptomatic HIV-infected individual "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B). These determinations primarily focus upon: (1) whether HIV infection by itself is a physical or mental impairment; and (2) whether the impairment substantially limits a major life activity (i.e., whether it has a disabling effect); or (3) whether someone with HIV infection could be regarded as having an impairment which substantially limits a major life activity.

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[8] Since the plaintiff had disabling physical symptoms and thus was clearly a handicapped individual under section 504, the Court declined to reach the question of whether a person without such an impairment could be considered handicapped by virtue of a communicable disease alone. As the Court stated, "[t]his case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS [who suffers no physical impairment] could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." Id. at 1128 n.7. Subsequent to Arline, the Surgeon General informed this Office that even an asymptomatic HIV-infected individual is physically impaired, stating that "from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B." Koop Letter at 2. In light of Dr. Koop's letter, this Office has no occasion to determine whether a contagious, but not impaired (continued...)

1. Asymptomatic HIV-Infected Individuals Are Physically Impaired

The Department of Health and Human Services regulations implementing section 504 define "physical impairment" as:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.

45 C.F.R. 84.3(j)(2)(i) (1987). In addition, an appendix to the regulations provides an illustrative (but not exhaustive) list of diseases and conditions that are "physical impairments" for purposes of section 504: "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, [and] emotional illness, and . . . drug addiction and alcoholism." 45 C.F.R. Pt. 84, App. A, p. 344 (1987).

The first question is whether an asymptomatic HIV-infected individual is physically impaired for purposes of section 504. For this factual determination we necessarily must rely heavily on the views of the Public Health Service of the United States. In this respect, Dr. C. Everett Koop, the Surgeon General of the Public Health Service, has indicated that it is

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[8] (...continued)
individual, such as a Hepatitis B carrier, would be protected by the Act. See note 3, supra. Cf., Kohl by Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226, 1236 (W.D. Mo. 1987) (finding a Hepatitis B carrier to be within the Act).

> inappropriate to think of [HIV infection] as composed of discrete conditions such as ARC or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system.

Koop Letter at 1-2. On the basis of these facts, the Surgeon General concluded that

> from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill.

Id. at 2.

In our view, the type of impairment described in the Surgeon General's letter fits the HHS definition of "physical impairment" because it is a "physiological disorder or condition" affecting the "hemic and lymphatic" systems.[9] We therefore believe that, in light of the Surgeon General's medical assessment, asymptomatic HIV-infected individuals, like their symptomatic counterparts, have a physical impairment.

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[9] Moreover, it would also appear that the impairment affects the brain and central nervous system as well. Medical evidence indicates that the AIDS virus, apart from any effect it has on the immune system, also attacks the central nervous system and may result in some form of mental deficiency or brain dysfunction in a significant percentage of persons infected with the virus. "Mental disease (dementia) will occur in some patients who have the AIDS virus before they have any other manifestation such as ARC or classic AIDS." U.S. Department of Health Services, Surgeon General's Report on Acquired Immune Deficiency Syndrome 32 (1986) (Surgeon General's Report). See also id. at 12 ("The AIDS virus may also attack the nervous system and cause delayed damage to the brain. This damage may take years to develop and the symptoms may show up as memory loss, indifference, loss of coordination, partial paralysis, or mental disorder. These symptoms may occur alone, or with other symptoms mentioned earlier.").

In addition, as discussed below with respect to the effects of HIV infection on major life activities, infection with the virus affects the reproductive system because of the significant danger that the virus will be transmitted to a baby during (continued...)

2. Asymptomatic HIV-Infected Individuals and Limits on Major Life Activities

The second question, therefore, is whether the physical impairment of HIV infection substantially limits any major life activities.

Under the HHS regulations implementing section 504, "'major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. 84.3(j)(2)(ii) (1987) (emphasis added). Although the definition is illustrative and not exhaustive, it does provide a helpful starting point for our analysis. We would expect that courts will resolve the factual question of whether the impairment of HIV infection limits a major life activity by reviewing this list for guidance in ascertaining whether a particular activity constitutes a basic function of life comparable to those on the list.

As indicated earlier, the disabling effects of HIV infection are readily apparent in the case of symptomatic HIV infection. The salient point with respect to symptomatic HIV-infected individuals is not that they have AIDS or ARC but rather that their impairment has manifest disabling effects. Again, as noted above, we believe that the courts will find that such individuals are limited in a number of major activities. Due to the weakness of their immune system and depending on the nature of the particular disease afflicting symptomatic HIV-infected individuals, any and perhaps all of the life activities listed in the HHS regulations could be substantially limited.

The question with respect to asymptomatic HIV-infected individuals is more difficult because such individuals would not appear at first glance to have disabling physical effects from their infection that substantially affect the type of life activities listed in the HHS regulations. Their ability, for example, to work, to care for themselves, to perform manual tasks, or to use their senses are usually not directly affected.

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[9] (...continued) pregnancy. Also bearing on whether HIV infection is a physical impairment under the HHS regulations is the Surgeon General's statement in his letter that HIV infection in its early stages is comparable to cancer -- a disease that is listed in the HHS regulations as a physical impairment -- in that infected individuals "may appear outwardly healthy but are in fact seriously ill." Koop Letter at 2.

Nevertheless, we believe it is likely that the courts will conclude that asymptomatic HIV-infected individuals have an impairment that substantially limits certain major life activities. While the Supreme Court explicitly refrained from answering this precise question in Arline, because HIV infection was not before it and perhaps in the mistaken understanding that asymptomatic HIV infection was not accompanied by an impairment,[10] the logic of the decision cannot fairly be said to lead to a different conclusion. This conclusion, we believe, may be based either on the effect that the knowledge of infection will have on the individual or the effect that knowledge of the infection will have on others. With respect to the latter basis, the Court observed, "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use this distinction to justify discriminatory treatment." Arline, 107 S. Ct. at 1128.

a. Limitation of Life Activities Traceable to Knowledge of Infection by Asymptomatic HIV-Infected Individual

Turning first to the effect knowledge of infection may have on the asymptomatic individual, it can certainly be argued that asymptomatic HIV infection does not directly affect any major life activity listed in the HHS regulations. 45 C.F.R. 84.3(j)(2)(ii) (1987). However, since the regulatory list was not intended as an exhaustive one, we believe at least some courts would find a number of other equally important matters to be directly affected. Perhaps the most important such activities are procreation and intimate personal relations.

Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation -- the fulfillment of the desire to conceive and bear healthy children -- is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy,[11] HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life activity and that the physical ability to engage in normal procreation -- procreation free from the fear of what the infection will do to one's child -- is substantially limited once an individual is infected with the AIDS virus.

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[10] Compare Arline, 107 S. Ct. at 1128 n.7 (suggesting that HIV infection is a disease without physical impairment) with Koop Letter at 2 (HIV infection is a physical impairment).

[11] Surgeon General's Report at 20-21 ("Approximately one third of the babies born to AIDS-infected mothers will also be infected with the AIDS virus.").

This limitation -- the physical inability to bear healthy children -- is separate and apart from the fact that asymptomatic HIV-infected individuals will choose not to attempt procreation. The secondary decision to forego having children is just one of many major life decisions that we assume infected individuals will make differently as a result of their awareness of their infection. Similarly, some courts can be expected to find a limitation of a major life activity in the fact that an asymptomatic HIV-infected individual's intimate relations are also likely to be affected by HIV infection. The life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus.[12]

Finding limitations of life activities on the basis of the asymptomatic individual's responses to the knowledge of infection might be assailed as not fully persuasive since it depends upon the conscience and good sense of the person infected. The causal nexus, it would be argued, is not between the physical effect of the infection (as specified in the Koop Letter) and life activities, but between the conscience or normative judgment of the particular infected person and life activities. Thus, it might be asserted that there is nothing inherent in the infection which actually prevents either procreation or intimate relations.[13]

It is undoubtedly true that some HIV-infected individuals have not or will not change their behavior after learning they are infected, thereby exhibiting disregard for the health of their offspring or sexual partners. Nonetheless, in any case where the evidence indicates that the plaintiff HIV-infected individual has in fact changed his or her behavior -- as, for example, where the plaintiff represents that procreation has been foregone -- the court might well find a limitation of major life activity. Moreover, courts may choose to pass over such factual questions since the Supreme Court has stated an alternative rationale for finding a life activity limitation based on the reaction of others to the infection. We turn to that rationale next.

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[12] Id. at 14-18.

[13] As indicated in the text, we think this argument is disingenuous at least insofar as infection physically precludes the normal procreation of healthy children.

b. *Limitation of Life Activities Traceable to Reaction of Others to Asymptomatic HIV Infection*

The *Arline* Court relied on the express terms of the statute for the proposition that a handicapped individual includes someone who is regarded by others as having a limitation of major life activities whether they do or not. 29 U.S.C. 706(8)(B)(iii). This provision was added by Congress in 1974. The Court cited the legislative history accompanying this textual expansion to show that an impaired person could be protected even if the impairment "in fact does not substantially limit that person's functioning," S. Rep. No. 1297, 93rd Cong., 2d Sess. 64 (1974), and observed that such an impairment "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 107 S. Ct. at 1129.

This construction by the Court of the statutory definition of the term "handicapped individual" has particular significance for the application of section 504 to asymptomatic HIV-infected individuals. The Court found that in order "[t]o combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped," *id*. at 1126, Congress intended by its 1974 amendment to expand the section's scope to include persons who are regarded as handicapped, but who "may at present have no actual incapacity at all." *Id*. at 1126-1127 (quoting *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405-406 n.6 (1979)). Stressing this point, the Court repeated later in the opinion that the amended definition covers persons "who, as a result [of being incorrectly regarded as handicapped], are substantially limited in a major life activity." *Id*. at 1129. The effect of this interpretation is that the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misperceptions of others, of limiting a life activity (in *Arline*, the activity of working).[14] Thus, at least one district court following Arline has held that if an individual or organization limits an HIV-infected individual's participation in a section 504 covered activity because of fear of contagion, a major life activity of the individual is substantially limited.[15]

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[14] The *Arline* Court appears not to accept the distinction between being perceived as having an impairment that itself limits a major life activity (the literal meaning of the statutory language) and having a condition the misperception of which results in limitation of a life activity. This may have been the distinction the Solicitor General was attempting to draw by suggesting there was a difference between being perceived as having a handicap that precludes work and being perceived as contagious, which does not physically preclude work, except that because of the perception, no work is offered. As recited by the Court, the Solicitor General stated at oral argument "that to argue that a condition that impaired *only* the ability to work was a handicapping condition was to make 'a totally circular argument

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C. Application of the "Otherwise Qualified" Requirement

The Supreme Court's opinion in Arline concluded by remanding the case for consideration by the district court of whether the plaintiff was "otherwise qualified." The Court indicated more generally that section 504 cases involving persons with contagious diseases should turn on the "otherwise qualified" issue, that such individuals must "have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise quali-

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[14] (...continued) which lifts itself by its bootstraps.' [Citation omitted] The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." Id. at 1129 n.10. This last statement, of course, returned the Court to the statute's literal meaning. The only justification for departing from that meaning occurs not in footnote 10 of Arline, but in footnote 9, where the Court relied on legislative history which does indicate that at least some members of Congress believed that the perception of a physical disability by others does not have to include the belief that the perceived condition results in a limitation of major life activities, but simply that the perception of the condition by others in itself has that effect. Id. at 1128 n.9 (physically repulsive aspects of cerebral palsy, arthritis, and facial deformities).

[15] Doe v. Centinela Hospital, Civ. 87-2514 (C.D. Cal. June 30, 1988) (holding HIV-infected individual to be "individual with handicaps" because he was perceived as such by the defendant). The district court wrote that a person is an individual with handicaps if he "has a physiological disorder or condition affecting a body system that substantially limits a 'function' only as a result of the attitudes of others toward the disorder or condition; . . ." Slip op. at 12. The HHS regulations are in accord with this view. 45 C.F.R. section 84.3(j)(2)(iv)(B) (1987). Although as indicated in the previous footnote we think this aspect of the Supreme Court's reasoning departs from the literal meaning of the statutory text in favor of legislative history, we do not question that the district court in Centinela Hospital fairly reads Arline to support a finding that the reaction of others to the contagiousness of an HIV-infected individual in itself may constitute a limitation on a major life activity.

fied.'" 107 S. Ct. at 1130. The Court stressed that before making this determination the trial court must

> conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks . . . . In the context of the employment of a person handicapped with a contagious disease . . . this inquiry should include "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." (Quoting Brief for American Medical Association as *Amicus Curiae* 19.) In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.

Id. at 1131 (footnotes omitted).

It is important to emphasize that the Court recognized that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." *Id*. at 1131 n.16. The Court has thus made it clear that persons infected with the AIDS virus will not be "otherwise qualified" to perform jobs that involve a significant risk of transmitting the virus to others. In addition, an "otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979).[16]

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[16] In ascertaining whether a person is otherwise qualified, the court considers "whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, . . ., or requires 'a fundamental alteration in the
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Based on current medical knowledge, it would seem that in most situations the probability that the AIDS virus will be transmitted is slight, and therefore as a matter of health and safety there will often be little, if any, justification for treating infected individuals differently from others.[17] Similarly, mere HIV infection involving only "subclinical manifestations" will generally also not render an individual unqualified to participate in a covered program or activity on the basis of inability to perform. As the disease progresses, however, and conditions such as ARC or "full blown" AIDS affect the physical or mental capacity of the individual, it may well be that an "individualized inquiry" will reveal that such person is not otherwise qualified to participate.

In addition, current medical knowledge does suggest the possibility of specialized contexts where, even with respect to a person in the early stages of the disease, a court might find an individual to be not otherwise qualified. These situations are very likely to involve individuals who have responsibility for health or safety, such as health care professionals or air traffic controllers. In these and similar situations where there is a greater possibility that the AIDS virus could be transmitted (see generally, Surgeon General's Report), or the consequences of a dementia attack could be especially dangerous (see note 9, supra), we believe a court could find, within the scope of "otherwise qualified" standard, a justification for treating HIV-infected individuals differently from uninfected individuals.

In brief, whether HIV-infected individuals will be found after the individualized inquiry required by Arline to be otherwise qualified will often depend on how far the disease has progressed. At the early stages of the disease, it is likely that neither health and safety nor performance will provide a justification for excluding an HIV-infected person. Moreover, while current medical knowledge suggests that safety should not be a concern in most contexts even as the disease progresses, an individualized assessment of performance may result in those with AIDS or ARC being found not otherwise qualified. Finally, courts may find in certain specialized contexts that an HIV-infected individual is not otherwise qualified at any stage of the disease because infection in itself presents an especially serious health or safety risk to others because of the nature of

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[16] (...continued)
nature of [the] program.'" 107 S. Ct. at 1131 n.17 (citations omitted).

[17] See Surgeon General's Report at 13 ("No Risk from Casual Contact").

the position. The inquiry in each case will be a factual one, and because of that, we are unable to speculate further.

III. Application of Section 504 in the Employment Context

A. Introduction and Summary

The Civil Rights Restoration Act included a provision, the Harkin-Humphrey amendment,[18] which amended the definitions section of the Rehabilitation Act to provide, with respect to employment, a specific qualification of the definition of an "individual with handicaps" in the context of contagious diseases and infections:

> For the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

As discussed below, application of the Harkin-Humphrey amendment in the employment context should result in substantially the same conclusions as result from application in the non-employment context of section 504 as interpreted in Arline. Specifically, we conclude that Harkin-Humphrey provides that HIV-infected individuals (regardless of whether or not they are symptomatic) are protected against discrimination in the employment context so long as they fall within the general section 504 requirements defining an "individual with handicaps" and do not contravene the specific qualification to the general requirements that the amendment provides: namely, that they do not "constitute a direct threat to the health or safety of other individuals" and they can "perform the duties of the job." In our judgment, this qualification merely codifies the "otherwise qualified" standard discussed by the Court in Arline and discussed above in this memorandum, including the provision of a means of reasonable accommodation that can eliminate the health or safety threat or enable the employee to perform the duties of the job, if it is provided for under the employer's existing personnel policies and does not impose an undue financial or administrative burden.

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[18] Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31-32 (1988). Since this amendment to section 504 was jointly sponsored by Senators Harkin and Humphrey, we will refer to the amendment in this opinion as "Harkin-Humphrey."

Because Harkin-Humphrey was a floor amendment that was not developed by a committee, there is no committee report explaining it. The only explanatory statement that accompanied its introduction was a one-sentence statement of purpose -- "Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context", 134 Cong. Rec. S256 (daily ed. Jan. 28, 1988) -- and a brief colloquy between the two sponsors. Id. at S256-257.

The sponsors' colloquy made three basic points. First, the amendment was designed to do in the contagious disease and infection context what the comparably phrased 1978 amendment to section 504 did in the context of alcohol and drug abuse[19] -- "assure employers that they are not required to retain or hire individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals, or cannot perform the essential duties of a job." Id. at S256-57. Second, the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." Id. at S257. Finally, "as we stated in 1978 with respect to alcohol and drug abusers, . . . the two-step process in section 504 applies in the situation under which it was first determined that a person was handicapped and then it is determined that a person is otherwise qualified." Id.

With that description of Harkin-Humphrey's principal legislative history as background, we now discuss the amendment's impact on two aspects of the application of section 504 to HIV infection cases in the employment context: (1) whether section 504 applies to both asymptomatic and symptomatic HIV-infected individuals; and (2) the manner in which the section's "otherwise qualified" requirement is to be applied, including whether employers must provide "reasonable accommodation" to infected individuals.

B. Coverage of All HIV-Infected Individuals (Subject to the Stated Limitations)

We have no difficulty concluding that the Harkin-Humphrey amendment, and thus section 504 in the employment context, includes within its coverage both asymptomatic and symptomatic HIV-infected individuals. The amendment's language draws no distinction between asymptomatic and symptomatic individuals and, notably, applies to a "contagious disease or infection." It therefore applies to all HIV-infected individuals, whether or not they are symptomatic. It is true that the amendment is phrased in the negative in that it says who is not handicapped, rather than defining who is handicapped. Nevertheless, we believe the natural implication of this statutory exclusion is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section. Accordingly, in light of our previous discussion of the application of the general provisions of section 504 to HIV-infected persons, we conclude that all HIV-infected individuals who are not a direct threat to the health or safety of others and are able to perform the duties of their job are covered by section 504.

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[19] "For purposes of sections 503 and 504 as such sections relate to employment, [the term "handicapped individual"] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." Pub. L. No. 95-602, sec. 122(a), 92 Stat. 2955, 2985 (1978), codified at 29 U.S.C. 706(8)(B).

Harkin-Humphrey's legislative history reinforces this reading of the amendment.[20] There was no disagreement expressed concerning the amendment's applicability to asymptomatic HIV-infected individuals, and a number of legislators expressly stated that such persons were covered. Senator Harkin described the purpose of the amendment in a letter, dated February 26, 1988, to Representatives Hawkins and Edwards. Senator Harkin explained that

> [t]he objective of the amendment is to expressly state in the statute the current standards of section 504 so as to reassure employers that they are not required to hire or retain individuals with contagious diseases or infections who pose a direct threat to the health or safety of others or who cannot perform the duties of a job.
>
> The basic manner in which an individual with a contagious disease or infection can present a direct threat to the health or safety of others is when the individual poses a significant risk of transmitting the contagious disease or infection to other individuals. The Supreme Court in Arline explicitly recognized this necessary limitation in the protections of section 504. The amendment is consistent with this standard.

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[20] Moreover, the model for the Harkin-Humphrey amendment -- the 1978 amendment to section 504 concerning drug addicts and alcoholics -- was intended to include within section 504 those covered persons not possessing the deficiencies identified in the statute. See generally, 124 Cong. Rec. 30322-30325 (1978) (statements of Senators Cannon, Williams, and Hathaway).

134 Cong. Rec. H1065 (daily ed. Mar. 22, 1988) (emphasis in original).[21]

During the subsequent debate in the House of Representatives, the Representatives who commented on the amendment indicated their understanding that persons with contagious diseases or infections were covered. For example, referring to the dissenting opinion in Arline, see 107 S. Ct. at 1132-1134, Representative Weiss observed:

> [Chief] Justice Rehnquist stated that Congress should have stated explicitly that individuals with contagious diseases were intended to be covered under section 504. Congress has done so now with this amendment, stating clearly that individuals with contagious diseases or infections are protected under the statute as long as they meet the "otherwise qualified" standard. This clarity is particularly important with regard to infections because individuals who are suffering from a contagious infection -- such as carriers of the AIDS virus or carriers of the hepatitis B virus -- can also be discriminated against on the basis of their infection and are also individuals with handicaps under the statute.

134 Cong. Rec. H573 (daily ed. Mar. 2, 1988). Representative Coelho stated that the amendment

> provides that individuals with contagious diseases or infections are protected under the statute unless they pose a direct threat to the health or safety of others or cannot perform the duties of the job.
>
> * * * * *
>
> People with contagious diseases and infections, such as people with AIDS or people infected with the AIDS virus, can be subject to intense and irrational discrimination. I am pleased that this amendment makes clear that such individuals are covered under the protections of the Rehabilitation Act.

Id. at H560-61. Representative Owens commented:

> I am glad to see that [the amendment] refers to individuals with contagious infections, thus clarifying

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[21] See also 134 Cong. Rec. S1739 (daily ed. Mar. 2, 1988) ("The purpose of the amendment was to clarify for employers the applicability of section 504 of the Rehabilitation Act of 1973 to persons who have a currently contagious disease or infection.") (statement of Sen. Harkin).

> that such infections can constitute a handicapping condition under the Act.

Id. at H574. The record is replete with similar comments.[22]

In summary, we believe that under the Harkin-Humphrey amendment, section 504 applies in the employment context to all HIV-infected individuals, which necessarily includes both asymptomatic and symptomatic HIV-infected individuals. This parallels our conclusions with respect to HIV-infected individuals, both symptomatic and asymptomatic, outside the employment context. The difference between the employment and non-employment contexts because of the Harkin-Humphrey amendment is thus more apparent than real. Specifically, it is our view that the Harkin-Humphrey amendment merely collapses the "otherwise qualified" inquiry applicable outside the employment context into the definition of "individual with handicaps" in the employment text. Thus, whether outside the employment context a particular infected person is deemed to be handicapped but ultimately receives no protection under the statute because that person poses a danger to others and is thereby not "otherwise qualified" or whether that same person is not deemed to be handicapped under the Harkin-Humphrey amendment in the employment context for the same reason is of only semantic significance. In either case, if the infection is a direct threat to the health or safety of others or renders the individual unable to perform the duties of the job, the grantee or employer is not required to include that person in the covered program or activity or retain or hire him in a job. Indeed, the legislative history suggests that the principal purpose of the Harkin-Humphrey amendment was the codification of the "otherwise qualified" limitation as discussed in Arline.[23]

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[22] See, e.g., 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("I commend the Members of the Senate for fashioning this amendment in such a way that the courts will continue to adjudicate cases involving AIDS, HIV infection and other communicable conditions on a case by case basis."); id. at E487 (statement of Rep. Hoyer) (referring to "people with AIDS and people infected with the AIDS virus" as equally subject to the amendment); id. at H580 (statement of Rep. Dannemeyer) (opposing amendment because it covers "asymptomatic carriers").

[23] "Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context," 134 Cong. Rec. S256 (daily ed. Jan. 28, 1988). See also the sponsors' colloquy, discussed supra in the text, as well as the comments of individual members. E.g., 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("This amendment . . . codif[ies] the 'otherwise qualified' framework (continued...)

C. Is There a "Reasonable Accommodation" Requirement Under Harkin-Humphrey?

The Department of Health and Human Services (HHS) regulations implementing section 504, first issued in 1977, reflect HHS' determination that a "reasonable accommodation" requirement is implicit in the "otherwise qualified" element of section 504. 42 Fed. Reg. 22676, 22678 (May 4, 1977). Then, as now, the regulations provided the following statement of the "otherwise qualified" requirement: "'Qualified handicapped person' means . . . [w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."[24] In Arline, the Supreme Court endorsed the "reasonable accommodation" requirement of the regulations, explaining that when a handicapped person is not able to perform the essential functions of the job, and is therefore not "otherwise qualified," "the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions."[25]

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[23] (...continued) for courts to utilize in these cases."); id. at H573 (statement of Rep. Weiss) ("In such circumstances [significant risk of communicating a contagious disease], the individual is not 'otherwise qualified' to remain in that particular position. The Supreme Court in Arline explicitly recognized this necessary limitation in the protections of section 504. The Senate amendment places that standard in statutory language . . . ."); id. at E487 (statement of Rep. Hoyer) ("[T]his amendment essentially codifies the existing standard of otherwise qualified in section 504, as explicated by the Supreme Court in Arline.").

[24] 45 C.F.R. 84.3(k)(1) (1987) (emphasis added). See also 45 C.F.R. 84.12 (1987) (setting forth the "reasonable accommodation" requirements).

[25] Arline, 107 S. Ct. at 1131 n.17. The Court suggested that two factors, originally employed by the Court in Davis, should be used to ascertain the reasonableness of an employer's refusal to accommodate a handicapped individual: "Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, Southeastern Community College v. Davis, supra, at 412, 99 S. Ct. at 2370, or requires a 'fundamental alteration in the nature of [the program' id. at 410. See 45 C.F.R. § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship) . . . ." Id.

As noted above, the Harkin-Humphrey amendment includes within it the "otherwise qualified" standard. We must determine whether a "reasonable accommodation" requirement is implicit in Harkin-Humphrey's special section 504 formulation, just as HHS and the Supreme Court found such a requirement to be implicit in section 504 prior to this amendment. More specifically, was Harkin-Humphrey intended to require reasonable accommodation of a contagious individual who, absent such accommodation, poses a "direct threat to the health or safety of other individuals or . . . is unable to perform the duties of the job?" The amendment's legislative history convinces us that Congress intended that consideration of "reasonable accommodation" should be factored into an employer's determination of whether an infected employee poses a direct threat or can perform the job.

The legislative history of the Harkin-Humphrey amendment indicates that Congress was quite aware that administrative and judicial interpretation had added the "reasonable accommodation" gloss to section 504, and Congress understood and intended that such a gloss would be put on Harkin-Humphrey. The first evidence of this is found in the colloquy between Senators Harkin and Humphrey upon the introduction of the amendment. The colloquy stressed that the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." 134 Cong. Rec. S257 (daily ed. Jan. 28, 1988). More expansively, Senator Harkin subsequently stated that

> the amendment does nothing to change the requirements in the regulations regarding providing reasonable accommodations for persons with handicaps, as such provisions apply to persons with contagious diseases and infections. Thus, if a reasonable accommodation would eliminate the existence of a direct threat to the health or safety of others or eliminate the inability of an individual with a contagious disease or infection to perform the essential duties of a job, the individual is qualified to remain in his or her position.

134 Cong. Rec. S1740 (daily ed. Mar. 2, 1988).

Senator Harkin's statement cannot be given dispositive weight because it was not joined by his co-sponsor, Senator Humphrey, and it was not made before the Senate voted on the amendment. However, Senator Humphrey never directly challenged this statement, or said that reasonable accommodation was not intended, and unchallenged statements to the same effect were made by members of the House speaking in favor of and against the amendment prior to the House vote on the amendment and by members of the Senate speaking in favor of and against the amendment prior to the vote to override the President's veto of the Civil Rights Restoration Act.

Prior to the House vote, for example, Representative Weiss remarked that

> [a]s the Senate amendment now restates in statutory terms, [individuals with contagious diseases or infections] are also not otherwise qualified if, without reasonable accommodation, they would pose a direct threat to the health or safety of others or could not perform the essential functions of a job.

Id. at H573. Representative Waxman said the same thing:

> the Court went on to say [in Arline] that if [persons with contagious diseases] pose a significant risk of transmitting their diseases in the workplace, and if that risk cannot be eliminated by reasonable accommodation, then they cannot be considered to be "otherwise qualified" for the job. The amendment added by the Senate to this bill places that standard in law.

Id. at H575 (emphasis added). Many other Representatives supporting the amendment agreed.[26] Opposing the amendment, Representative Dannemeyer stated that "[i]f this bill is passed as presently written, employers will be required to accommodate victims of this fatal disease despite potential health threats to other employees." Id. at H580.

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[26] E.g., 134 Cong. Rec. E501 (daily ed. Mar. 3, 1988) (statement of Rep. Miller) ("[T]he new language added by the Senate changes nothing with respect to current law and is not intended to displace the . . . reasonable accommodations requirement under section 504."); 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("The colloquy in the Senate between the two cosponsors of the amendment clarifies that it is the intent of Congress that the amendment result in no change in the substantive law with regard to assessing whether persons with this kind of handicapping condition are 'otherwise qualified' for the job in question or whether employers must provide 'reasonable accommodations' for such individuals."); id. at H561 (statement of Rep. Coehlo) ("[I]ndividuals with contagious diseases and infections are not otherwise qualified -- and thus are not protected in a particular position -- if, without reasonable accommodation, they would pose a direct threat to the health or safety of others or cannot perform the duties of the job."); id. at E487 (statement of Rep. Hoyer) (not "otherwise qualified" if risk of communicating contagious disease "cannot be eliminated by reasonable accommodation"); id. at H571 (statement of Rep. Jeffords) (same); id. at H574 (statement of Rep. Owens) (same).

Prior to the Senate vote to override the President's veto of the Civil Rights Restoration Act, Senator Harkin reiterated his intent and understanding that reasonable accommodation was required:

> I say to this body this bill does not I repeat does not require an employer to hire or retain in employment all persons with contagious diseases. An employer is free to refuse to hire or fire any employee who poses a direct threat to the health or safety of others who cannot perform the essential functions of the job if no reasonable accommodation can remove the threat to the safety of others or enable the person to perform the essential functions of the job. This determination must be made on an individualized basis and be based on facts and sound medical judgment.

134 Cong. Rec. S2435 (daily ed. Mar. 17, 1988) (emphasis added). Moreover, in arguing that the President's veto should be sustained, a number of Senators stated their understanding that Harkin-Humphrey would require reasonable accommodation. Senator Hatch included in his list of objectionable features of the Civil Rights Restoration Act "the requirement to attempt to accommodate persons with infectious diseases, such as tuberculosis and AIDS." Id. at S2403. Senator Symms made the same point, arguing that "[t]he equality-of-result rather than equality-of-opportunity standards [in the Civil Rights Restoration Act] can lead to . . . the need to attempt to accommodate infectious persons . . . ." Id. at S2410.

Moreover, in addition to this direct evidence of congressional intent concerning the Harkin-Humphrey amendment, we also find illuminating the evidence that the 1978 drug and alcohol abuse amendment, on which Harkin-Humphrey is modeled,[27] was intended to require reasonable accommodation. During the Senate debate on Harkin-Humphrey, Senator Cranston observed that the drug and alcohol abuse amendment

> did not result in any basic change in the process under section 504 by which it is determined whether the individual claiming unlawful discrimination is handicapped and whether that individual is "otherwise qualified," taking into account -- as in the case of all other handicapped persons -- any reasonable accommodations

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[27] See sponsors' colloquy, 134 Cong. Rec. S256-57 (daily ed. Jan. 28, 1988).

> that should be made to enable him or her to perform the job satisfactorily.

134 Cong. Rec. S724 (daily ed. Feb. 4, 1988) (emphasis added).

The legislative history of the drug and alcohol abuse amendment supports Senator Cranston's assertion that "reasonable accommodation" was required under that amendment. That legislative history is clear that the amendment was designed to codify the existing "otherwise qualified" standard, as interpreted by the Attorney General and the Secretary of HEW, which included the "reasonable accommodation" requirement.[28] In explaining the amendment, one of its sponsors specifically cited the "reasonable accommodation" requirement:

> Regulations implementing sections 503 and 504 already address [the concerns of employers and others seeking the amendment]. They make clear that the protections of sections 503 and 504 only apply to otherwise qualified individuals. That means . . . that distinction on the basis of qualification is perfectly justifiable. Regulations implementing section 503 define "qualified handicapped individual" as a handicapped person who is capable of performing a particular job with reasonable accommodation to his or her handicap.[29]

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[28] 43 Op. Atty' Gen. No. 12, at 2 (1977) (section 504 does not "require unrealistic accommodations" for drug addicts or alcoholics); 42 Fed. Reg. 22676, 22678 (May 4, 1977) (promulgating "otherwise qualified" definition, which is identical to current definition and thus includes reasonable accommodation).

[29] 124 Cong. Rec. 30324 (1978) (statement of Sen. Hathaway) (emphasis added). The sponsors of the amendment believed that it "simply [made] explicit what prior interpret[ations] of the act -- including those of the Attorney General and the Secretary of Health, Education, and Welfare -- have found . . . ." Id. at 37510 (statement of Sen. Williams). They did not believe that a change in law was necessary, but they were willing to provide a clarification in order to "reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." Id. at 30323. The amendment used an "otherwise qualified" formulation to clarify how existing law applied to drug and alcohol abusers. As explained by Senator Williams, "while the legislative history of the 1973 act, as authoritatively interpreted by the Attorney General, made clear that qualified individuals with conditions or histories of alcoholism or drug addiction were protected from discrimination by covered employers, this amendment codifies that intent." Id. (continued...)

Our final reason for believing that Congress intended the Harkin-Humphrey amendment to preserve the "reasonable accommodation" requirement of existing law is that a contrary conclusion would entail overruling a specific holding of Arline. After holding that the plaintiff in Arline was a "handicapped individual," the Supreme Court remanded the case to the district court for the "otherwise qualified" determination, which the Court said should include "evaluat[ing], in light of [a series of medical findings], whether the employer could reasonably accommodate the employee under the established standards for that inquiry." 107 S. Ct. at 1131.

Any reading of the Harkin-Humphrey amendment that precluded reasonable accommodation would be inconsistent with that Arline holding. Applying Harkin-Humphrey without reasonable accommoda-

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[29] (...continued) at 37509.

Senator Williams' reference to the Attorney General was to an opinion Attorney General Bell provided to HEW Secretary Califano a month before HEW's promulgation (on May 4, 1977) of its regulations implementing section 504. 43 Op. Att'y Gen. No. 12 (1977). While concluding that drug and alcohol abusers were "handicapped individuals" subject to the same protections under section 504 as were all other handicapped individuals, the Attorney General stressed the applicability of the "otherwise qualified" requirement:

> [O]ur conclusion that alcoholics and drug addicts are "handicapped individuals" for purposes of section 504 does not mean that such a person must be hired or permitted to participate in a federally assisted program if the manifestations of his condition prevent him from effectively performing the job in question or from participating adequately in the program. A person's behavior manifestations of a disability may also be such that his employment or participation would be unduly disruptive to others, and section 504 presumably would not require unrealistic accommodations in such a situation.

Id. at 2 (emphasis added). As Senator Williams noted (124 Cong. Rec. 30324 (1978)), Secretary Califano's statement accompanying issuance of the regulations agreed with the Attorney General's interpretation and his emphasis on the "otherwise qualified" requirement. 42 Fed. Reg. 22676, 22686 (May 4, 197). The regulations issued by Secretary Califano included the "otherwise qualified" regulation requiring reasonable accommodation. Id. at 22678.

tion to an individual like the plaintiff in *Arline* would probably result in a finding that the individual is a direct threat to the health and safety of her students without any meaningful consideration of non-burdensome ways to alleviate the danger. Thus, under that reading, an individual with tuberculosis (or an HIV-infected individual) would receive less individualized scrutiny under the amendment than under *Arline*. However, it is clear that Congress did not intend to overrule *Arline*. Indeed, supporters of Harkin-Humphrey repeatedly and unequivocally spoke of codifying *Arline* and acting consistently with *Arline*, including specifically *Arline*'s approach to "otherwise qualified" and "reasonable accommodation."[30] Only a single statement by Senator Humphrey is arguably somewhat to the contrary, and even this remark does not undermine our conclusion, or the overwhelming evidence of legislative intent on which it is based.[31] Senator Humphrey merely stated that the amendment must result in some change or it would have been "pointless." However, codifying a Supreme Court holding in a manner designed to reassure those infected with a contagious disease of the law's protection and employers of the law's limits has a point.

For the foregoing reasons, we conclude that implicit in Harkin-Humphrey's statement of the "otherwise qualified" standard for the contagious disease context is a "reasonable accommodation" requirement.[32] Accordingly, before determining that an HIV-infected employee is not an "individual with handicaps," an employer must first consider whether, consistent with the employer's existing personnel policies for the job in question, a reasonable accommodation would eliminate the health or safety threat or enable the employee to perform the duties of the job.

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[30] *E.g.*, 134 Cong. Rec. S2435 (daily ed. Mar. 17, 1988) (statement of Sen. Harkin); 134 Cong. Rec. S1739 (daily ed. Mar. 2, 1988) (statement of Sen. Harkin, concurred in by Sen. Kennedy and Sen. Weicker); 134 Cong. Rec. S725 (daily ed. Feb. 4, 1988) (statement of Sen. Cranston); 134 Cong. Rec. H560-61 (daily ed. Mar. 2, 1988) (statement of Rep. Coelho); *id.* at H567 (statement of Rep. Hawkins); *id.* at H571 (statement of Rep. Jeffords); *id.* at H574 (statement of Rep. Owens); *id.* at H575 (statement of Rep. Waxman); *id.* at H584 (statement of Rep. Edwards).

[31] 134 Cong. Rec. S970 (daily ed. Feb. 18, 1988) (statement of Sen. Humphrey) ("If the Humphrey-Harkin amendment had not resulted in some substantive change in the law, it would have been a pointless exercise. . . . [The amendment was not] intended merely to codify the status quo in this area. The language of these measures is quite clear, and post facto interpretations should not be construed to alter their actual intent or effect.").

[32] The American Law Division of the Library of Congress' Congressional Research Service has reached the same conclusion. CRS Report for Congress, *Legal Implications of the Contagious Disease or Infections Amendment to the Civil Rights Restoration Act, S. 557* 18-23 (March 14, 1988).

Arline's discussion of the HHS regulations' "reasonable accommodation" requirement presents a useful point of reference for considering what "reasonable accommodation" should be provided for HIV-infected individuals in the employment context. As noted by the Court, the HHS regulations provide that "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." 107 S. Ct. at 1131 n.19. However, "where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination." 45 C.F.R., Part 84, App. A., p. 350 (1987).

While reasonable accommodation is part of the individualized factual inquiry and therefore difficult to discuss in the abstract, it clearly does not require allowing an HIV-infected individual to continue in a position where the infection poses a threat to others. This would appear to be the case with infected health care workers who are involved in invasive surgical procedures, and it may also be the case with respect to other infected health care workers or individuals employed in jobs that entail responsibility for the safety of others. Limited accommodations might be required if alternative employment is reasonably available under the employer's existing policies. For example, a surgeon in a teaching hospital might be restricted to teaching or other medical duties that do not involve participation in invasive surgical procedures, or a policeman might be reassigned to duties that do not involve a significant risk of a physical injury that would involve bloodshed. In contrast, given the evolving and uncertain state of knowledge concerning the effects of the AIDS virus on the central nervous system, it may not be possible, at least if the disease has sufficiently progressed, to make reasonable accommodation for positions, such as bus driver, airline pilot, or air traffic controller, that may allow very little flexibility in possible job assignment and where the risk of injury is great if the employer guesses wrongly and the infected person is not able to perform the duties of the job.

Conclusion

We have concluded, with respect to the non-employment context, that section 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity -- so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in *Arline*. We have further concluded that section 504 applies in substance in the same way in the employment context, since the statutory qualification set forth in the Civil Rights Restoration Act merely incorporates the *Arline* "otherwise qualified" standard for those individuals who are handicapped under the general provisions of section 504 by reason of a currently contagious disease or infection. The result is the same: subject to an employer making reasonable accommodation within the terms of his existing personnel policies, the symptomatic or asymptomatic HIV-infected individual is protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.

Doug W Kmiec

Douglas W. Kmiec
Acting Assistant Attorney General
Office of Legal Counsel

Attachment

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

The Surgeon General of the
Public Health Service
Washington DC 20201

July 29, 1988

Douglas Kamiec, Esq.
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C.

Dear Mr. Kamiec:

I was pleased to be able to convey to you, at our meeting of July 20, 1988, our medical and public health concerns regarding discrimination and the current HIV epidemic. These concerns will be greatly affected by the extent to which HIV infected individuals understand themselves to be protected from discrimination on account of their infection.

Protection of persons with HIV infection from discrimination is an extremely critical public health necessity because of our limited tools in the fight against AIDS. At this time, we have no vaccine to protect against HIV infection and only one treatment which appears to extend the lives of some persons with AIDS but does not cure the disease. Consequently, the primary public health strategy is prevention of HIV transmission.

This strategy requires extensive counseling and testing for HIV infection. If counseling and testing are to work most effectively, individuals must have confidence that they will be protected fully from HIV related discrimination.

During our meeting you and members of your staff raised a number of perceptive questions concerning the nature of HIV infection including the pathogenesis of the virus and its modes of transmission. Your interest in the scientific aspects of HIV infection is welcome, since it is our belief that any legal opinion regarding HIV infection should accurately reflect scientific reality. As I sought to emphasize during our meeting, much has been learned about HIV infection that makes it inappropriate to think of it as composed of discrete conditions such as ARC or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system. Almost all, HIV infected persons will go on to develop more serious manifestations of the disease and our present knowledge suggests that all will die of HIV infection barring premature death from other causes.

Accordingly, from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill. Regrettably, given the absence of any curative therapy for AIDS, a person with cancer currently has a much better chance of survival than an HIV infected individual.

Please do not hesitate to contact me if I can be of any further assistance to you in this matter.

Sincerely,

C. Everett Koop, M.D.
Surgeon General

STATEMENT OF EDWARD D. BERKOWITZ AND DAVID H. DEAN ON THE AMERICANS WITH DISABILITIES ACT OF 1989 PREPARED FOR THE COMMITTEE ON LABOR AND HUMAN RESOURCES, MAY 9, 1989

I am Edward Berkowitz, and I direct the Program in History and Public Policy and serve as a Professor of History and Public Policy at George Washington University. I am joined in this statement by David H. Dean, who is an Assistant Professor of Economics at the University of Richmond.

Professor Dean and I speak in support of the Americans with Disabilities Act of 1989. We believe that the Act represents an appropriate direction for the nation's disability policy, and that now is the time for the Congress to act on this matter.

Each of us has devoted much of his career to understanding the costs of disability. Professor Dean has worked closely with the Bureau of Economic Research at Rutgers University and Professor Monroe Berkowitz on studies related to the costs of disability and the efficiency of rehabilitation. Our statement draws on those studies.

My research on disability policy has resulted in the publication of Disabled Policy: A Twentieth Century Fund Report (Cambridge University Press, 1987). I have also written a series of reports on the structure and function of America's disability programs. These include an edited book, Disability Programs and Government Policies, (1979) that summarized a major study of disability policy undertaken by the Assistant Secretary for

Planning and Evaluation of the Department of Health, Education, and Welfare, a report to the Senate Special Committee on Aging on "Emerging Issues in Disability Policy," published in 1985, and a special report on "Incentives for Reducing the Costs of Disability," prepared for a task force of the Committee on Economic Development and published this year. I have also consulted on disability policy for such groups as the Milbank Memorial Fund and the Hastings Center on Biomedical Ethics.

Other of my publications in the field of disability policy include "The Cost Benefit Tradition in Vocational Rehabilitation," in Monroe Berkowitz ed. Measuring the Efficiency of Public Programs (Philadelphia: Temple University Press, 1988) and "Benefit Cost Analysis," Rehabilitation Research Review, 1983 [with Monroe Berkowitz]. Other peer-reviewed articles and essays related to disability policy have appeared in academic journals such as The Journal of Social History, The Journal of Policy History, The Journal of Economic History, Social Science Quarterly, The Social Service Review, and The American Journal of Economics and Sociology.

The Costs of Disability

The costs of disability are, all too often, simply that: the costs of maintaining inactivity rather than the costs of investing in peoples' productivity.

This nation already spends a significant amount of money on disability. The best available estimates, prepared by the Rutgers Bureau of Economic Research, put the level of 1986 disability expenditures for the working age population at 169.4 billion dollars. This figure includes $75 billion in federal expenditures for such programs as Social Security Disability Insurance, Supplemental Security Income, Medicare, Medicaid, Food Stamps, and Veterans Compensation.

The $169.4 billion equals 4% of the nation's gross national product, and it amounts to $1,136 for each person between 18 and 64 years of age. I enclose a "fact sheet" at the end of this testimony that summarizes the nature of our disability expenditures.

These numbers reflect a substantial increase in disability expenditures that has taken place in recent years. In 1970, this nation spent 19.3 billion dollars on disability. Even if we take inflation into account, the rise has been impressive. In real dollars, we now spend three times as much on disability as we did in 1970, when "only" 1.9% of our gross national product went for disability.

Such figures, by themselves, should not scare us. What is distressing, however, is that we spend most of the money in the form of subsidizing inactivity. We insist that a person withdraw from the labor force before we will come to the person's aid. In many cases, we ask people to retire before we offer to rehabilitate them or provide them with medical care. Such an approach fails to recognize the capabilities of people with disabilities; it fails to credit the American people with the ingenuity of which they are capable.

Consider in this regard just where our disability dollars go. In 1970, this nation spent a nickel of each of its disability dollars on direct services, such as rehabilitation, that were designed to encourage people to reach their maximum potential. In 1986, this nation devoted only two cents of each of its disability dollars to direct services. By way of contrast, we spent over half of our 1986 disability dollars on monetary payments from the rest of society to people with disabilities and 47 cents of each disability dollar for medical care.

These trends reflect, in part, the stringency in the federal budget and the rising costs of medical care. Discretionary dollars, such as fund the vocational rehabilitation program, have been squeezed, as the nation has struggled to manage its public debt and still meet its public obligations. The prospects are for the continued diminution of direct services within our disability budget. We will, therefore, need to find other means to facilitate the participation of the handicapped in American life. Of these means none is more important than the extension of civil rights.

We should not think of these disability expenditures only as public expenses. In fact, many of our disability expenditures originate through the private sector. In 1986, for example, we spent $31.8 billion for monetary payments that were made by the private sector. These included $3 billion for disability expenditures arising through private insurance policies and $1.9 billion consumed by private pensions. Let us be clear about the nature of these expenditures: These were payments that private employers made to people for not working.

Such payments were the private counterparts to the benefits that we pay through our Social Security Disability Insurance Program to 2.8 million workers who have been judged "unable to engage in substantial gainful activity." Such payments cost $20.1 billion in 1986, in addition to the $8.8 billion in Medicare payments for Social Security Disability Insurance beneficiaries. In addition, the nation spent $5.4 billion in disability-related SSI expenditures and $15.6 billion for Medicaid expenditures related to disabled SSI beneficiaries.

These were all components of the $169.4 billion bill that the nation paid for disability, but the true costs of disability were even higher. These costs of disability included the income lost and extra expenses incurred by people with disabilities.

Research in this area is tentative, but the best evidence, compiled by the Rutgers Bureau of Economic Research, suggests that in 1977, the only year for which this type of data is available, the economic losses resulting from disability, which must be counted in addition to the direct expenditures on disability, were 100.3 billion dollars. More than 85% of those losses came in the form of lost earnings.

The American with Disabilities Act of 1989 should, therefore, be considered in relation to the money already being spent on disability. No longer would we make retirement the chief weapon in our arsenal of disability programs; instead our public policies would point consistently toward participation.

A popular health guide quotes a woman as saying, "We are not disabled; it is society which disables us by being so unsupportive." Perhaps this unsupportive attitude helps to explain the troubling association between people with disabilities and poverty. The average earnings for people with disabilities in 1980 was $6,000, compared with $11,300 for the nondisabled. About 7% of working-age nondisabled households had family income below the poverty level. By contrast, some 24% of households with a family member who was severely disabled had family income below the poverty level (and that includes the help that they may get from the government).

One way to think of the effects of the Americans with Disabilities Act is to recognize that as people with disabilities realize earnings commensurate with their productivity, the disincentives to work will be lessened. A higher earnings level, quite simply, will make working more attractive and will point our social welfare policy toward the participation of people with disabilities rather than their withdrawal from the mainstream of American life.

Why the Time is Now

Each generation of legislators has only a few opportunities to contribute in a positive way to the content of public laws and the conduct of public policy. In the field of disability legislation, I believe that now is the time to take definitive measures to combat prejudice and discrimination.

Each generation of legislators works within the contours of the possible. For the state legislators of the progressive era that meant a chance to modify the tort system and implement a no-fault workers' compensation program. For the Congressmen of the New Deal, that meant a chance to start the nation's social security system. For the policymakers of the Eisenhower era, that meant the opportunity to extend the social security system to cover the risk of disability. For the law makers of the 1970s, that meant the chance to salvage Supplemental Security Income from the wreckage of welfare reform.

Each of these opportunities has helped to define our present approach to disability policy, an approach that, in the interests of humanity, has relied on providing people with tickets out of the labor force. Now we have a realistic opportunity to bring our nation's disability policy to a new level, one that does not require people with disabilities to cope in futility with the existing environment so much as it provides a means of altering the environment so as to lessen the effects of prejudice and discrimination. No longer does public policy need to focus exclusively on tickets out of the labor force. Now we have the means to provide tickets into the labor force that will give people with disabilities the chance to participate in the nation's work force. This legislation, then, is a law in aid of the free market and not a creature of the welfare state. It is, in short, legislation that suits the temper of the times.

Demography also favors passage of this law at this moment. We know that the population is aging and that disability and age are strongly correlated. We are virtually certain that the median age of the population should rise between 1990 and 2040 from 33 to 42 years. The best estimates also conclude that the percentage of the population 65 years or older should grow from 12.7 in 1990 to 21.7 (or about 67 million people) in 2040.

From the perspective of disability, it is the years just before the retirement age that are critical. The average age of Social Security Disability Insurance beneficiaries has been about 52 years old; the median age has been higher. Right now the largest single group in the general population is between 28 and 32 years old. This group will reach the critical point for going on disability insurance when its members reach age 50. That will happen in about 18 years, the year 2007.

We know from foreign experience just how costly the aging of the population can be. West Germany, for example, has experienced a spectacular rise in its disability rolls from 1965 to 1984, from one million to just over 2.25 million recipients. Comparable declines in the labor force participation of older workers and increases in the percent receiving disability transfer payments were experienced in the Netherlands and Sweden for this general period.

Right now we are in a benign period before the baby boom approaches the disability years and then the retirement years. The labor force has completed the job of absorbing the baby boom and of making room for the increased participation of women in the labor force. Some even speak of a coming labor shortage, as the baby bust age cohort enters the work force. Trouble in the form of increased social welfare expenditures, however, looms right around the corner. The percentage of people 55 to 64 in the population was 9.6 in 1980, but the percentage will decline to 8.4 in 1990. By 2010, the percentage will rise again, to a level of 12.3 (which represents 35 million people).

Now, in the interlude between the baby boom and its echo, is the time for us to create constructive alternatives to people declaring themselves "unable to engage in substantial gainful activity." Now is the time for a new approach toward people with disabilities. Such an approach will help to alleviate the coming labor shortage, and it will do much to reduce the "disability crunch" that should arrive within a few years.

The Americans with Disabilities Act, I believe, is an important piece of legislation on which this generation of legislators should put its stamp.

Consortium for
Citizens with
Disabilities

For further information contact:

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FOR IMMEDIATE RELEASE: MAY 9, 1989

Over eighty national disability organizations applauded the introduction of the Americans With Disabilities Act of 1989, introduced in both houses of Congress this week. "Too long have Americans with disabilities, out nation's largest minority, experienced discrimination in every sphere of their lives." said Paul Marchand, Chairman of the Consortium for Citizens with Disabilities. "The Americans With Disabilities Act is a declaration that this country opposes unfair biases and unnecessary barriers restricting the opportunities of 43 million Americans in our land of opportunity."

Senators Tom Harkin (D-IA), Edward Kennedy (D-MA), and David Durenberger (R-MN) and Congressmen Tony Coelho (D-CA), Hamilton Fish Jr. (R-NY) and Silvio Conte (R-MA) introduced identical versions of this Act. This legislation would prohibit discrimination against people with disabilities in employment, public accommodations, transportation, telecommunications and the activities of state and local governments.

"This bill is a very important measure for all people with disabilities, regardless of the type of disability," Marchand added. "Whether you're a person who is blind, deaf, mobility handicapped, mentally retarded, or has a mental illness, you share the common experience of discrimination."

As evidence of the need for this Act, its authors point out that over two-thirds of all Americans with disabilities are unemployed and a high percentage live in poverty. "Such conditions are not the inevitable result of the disabling conditions themselves," stated Marchand, "but rather of various kinds of discrimination, such as the biases of employers and the lack of transportation and public accommodation."

The Act would extend federal discrimination protections found in the Civil Rights Acts of 1964 to people with handicaps, who are not currently included among the protected groups. The bill is also viewed as an extension of Section 504 of the Rehabilitation Act of 1973, which protects people with disabilities from discrimination in activities receiving federal funding. Section 504 is widely regarded as a highly successful start in barring discrimination against people with handicaps. The Americans With Disabilities Act just may be the completion of this nation's commitment to protecting people with disabilities from discrimination, which was begun with the 1973 Act.

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LIST OF SUPPORTING ORGANIZATIONS IS ATTACHED

NATIONAL ORGANIZATIONS SUPPORTING THE AMERICANS WITH DISABILITIES ACT OF 1989

ACLD, An Association for Children and Adults with Learning Disabilities
AIDS Action Council
Alexander Graham Bell Association for the Deaf
American Academy of Child and Adolescent Psychiatry
American Academy of Otolaryngology Head and Neck Surgery
American Association for Counseling and Development
American Association of the Deaf Blind
American Association of University Affiliated Programs
American Association on Mental Retardation
American Association for Counseling and Development
American Civil Liberties Union
American Council of the Blind
American Deafness and Rehabilitation Association
American Diabetes Association
American Disabled for Accessible Public Transportation
American Foundation for the Blind
American Psychological Association
American Society for Deaf Children
American Speech-Language-Hearing Association
Association for the Education of Rehabilitation Facility Personnel
Association for the Education and Rehabilitation of the Blind and Visually Impaired
Association for Retarded Citizens of the United States
Autism Society of America
Child Welfare League of America
Conference of Educational Administrators Serving the Deaf
Convention of American Instructors of the Deaf
Disability Rights Education and Defense Fund
Disabled But Able to Vote
Epilepsy Foundation of America
Gallaudet University
Gallaudet University Alumni Association
Gazette International Networking Institute
International Association of Parents of the Deaf
International Polio Network
International Ventilator Users Network
Lamda Legal Defense and Education Fund
Leadership Conference on Civil Rights
Mental Health Law Project
National Alliance for the Mentally Ill
National Association for Music Therapy
National Association of Developmental Disabilities Councils
National Association of the Deaf
National Association of Private Residential Resources
National Association of Protection and Advocacy Systems
National Association of Rehabilitation Facilities
National Association of Rehabilitation Professionals in the Private Sector

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National Association of State Mental Retardation Program Directors
National Center for Law and the Deaf
National Coalition for Cancer Survivorship
National Council on Independent Living
National Council on Rehabilitation Education
National Down Syndrome Congress
National Easter Seal Society
National Federation of the Blind
National Fraternal Society of the Deaf
National Handicapped Sports and Recreation Association
National Head Injury Foundation
National Mental Health Association
National Multiple Sclerosis Society
National Network of Learning Disabled Adults
National Organization for Rare Disorders
National Organization on Disability
National Recreation and Park Association
National Rehabilitation Association
National Spinal Cord Injury Association
Paralyzed Veterans of America
People First International
Registry of Interpreters of the Deaf, Inc.
Self Help for Hard of Hearing People, Inc.
Spina Bifida Association of America
Telecommunications for the Deaf, Inc.
The Association for Persons with Severe Handicaps
The Gray Panthers
Tourette Syndrome Association
United Cerebral Palsy Associations
Women's Equity Action League
Women's Legal Defense Fund
World Institute on Disability

May 8, 1989

Dear Senators Harkin and Kennedy:

We, the undersigned representatives of denominations and faith groups in the United States, are deeply concerned about the discrimination daily faced by individuals with physical or mental disabilities. Such discrimination can be found in every segment of life in this society. Although there have been some improvements in the last few years, largely due to protections afforded by section 504 of the Rehabilitation Act of 1973, such discrimination remains a pervasive problem for over 42 million disabled Americans.

As members of faith groups, it is our responsibility to strengthen and heal one another within the human family. The unity of the family is broken where any are left out or are subject to unequal treatment or discrimination. "If one member suffers, all suffer together; if one member is honored, all rejoice together" (1 Corinthians 12:26). Those with physical and mental disabilities have for too long been the target of such suffering, prejudice and discrimination effectively denying them the opportunity to compete on an equal basis for all of the rights, privileges and opportunities that are afforded to others as members of this society.

We write today to express our support for strong federal legislation addressing these issues, particularly in the private sector where much of that discrimination now takes place. We urge that you support legislation to protect the rights of persons with disabilities including particular attention to the problem of discrimination in employment, communications, access to public services, and public accommodations. One such piece of legislation introduced in Congress which appears to us to meet our principles is the **Americans with Disabilities Act of 1989.** This legislation provides protection against discrimination for individuals with disabilities similar to protection provided other minorities in current civil rights law.

We also want to make clear our support for inclusion of those infected by the Human Immunodeficiency Virus and people living with AIDS. We concur with the *Report of the Presidential Commission on the HIV Epidemic*:

> As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination will limit the public's willingness to comply with the collection of epidemiological data and other public health strategies, will undermine our efforts to contain the HIV epidemic, and will leave HIV-infected individuals isolated and alone. Discrimination against persons with HIV infection in the workplace setting, or in areas of housing, schools, and public accommodations is unwarranted because it has no public health basis. Nor is there any basis to discriminate against those who care for or associate with such individuals.

The American with Disabilities Act provides that an individual with a disability must be given equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs. We urge you to support this bill, or similar legislation, that protects the rights of the disabled by helping to insure that all members of this society are allowed to participate on an equal basis.

Thank you for your consideration of this important issue.

Sincerely,

Dr. Daniel E. Weiss
General Secretary
American Baptist Churches, USA

Dr. John O. Humbert
General Minister and President
Christian Church (Disciples of Christ)

Dr. Donald E. Miller
General Secretary
Church of the Brethren

Dr. Claire Randall
President
Church Women United

The Most Reverend Edmond L.Browning
Presiding Bishop .
The Episcopal Church

The Reverend Dr. Herbert W. Chilstrom
Bishop
Evangelical Lutheran Church in America

Edward F. Snyder
Executive Secretary
Friends Committee on National Legislation

The Reverend Arie R. Brouwer
General Secretary
National Council of Churches

Rabbi Irwin M. Blank
Past President
Synagogue Council of America

Rabbi Alexander Schindler
President
Union of American Hebrew Congregations

Dr. William F. Schultz
President
Unitarian Universalist Association

Dr. Avery D. Post
President
United Church of Christ

Bishop Robert C. Morgan
President
General Board of Church and Society
The United Methodist Church

Prepared Statement of the National Coalition for Cancer Survivorship

The National Coalition for Cancer Survivorship (NCCS) is a network of individuals, organizations, medical centers and health professionals working to improve the quality of life after a cancer diagnosis. A major concern of NCCS is to expand employment opportunities for individuals with a cancer history, a concern addressed squarely by the American with Disabilities Act. This year, more than 1,000,000 million adults will be diagnosed with cancer, the majority of whom are employed or employable, and will overcome their illness.

Approximately twenty-five percent of the five million individuals in the United States with a cancer history ("cancer survivors") experience some form of employment discrimination solely because of their medical history. Acts of discrimination include dismissal, denial of new jobs, demotions, loss of benefits such as insurance, undesirable transfers, isolation and hostility in the workplace, and mandatory medical examinations unrelated to job performance. Some disparate treatment, such as blanket hiring bans against all individuals with a cancer history, is irrational and blatant. Other employment decisions, especially actions by legally sophisticated employers, are far more subtle. Such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments.

Studies of the work experiences of cancer survivors found that between 20% and 84% report employment discrimination attributed to their cancer histories. (1)(2)(3)(4)(5)(6) The percentages of those reporting job problems varied depending on many factors, including type of cancer, proximity to treatment, type of job, and the researchers' criteria for determining which reported problems constituted cancer based discrimination.

A conservative summary of these studies reveals that at least 25% of all cancer survivors encounter work problems related to their cancer histories, despite their qualifications for the job. Although many survivors have to leave work for treatment, approximately 80% are usually able to return to their jobs.(7)(8)(9) Many survivors, especially blue collar workers, however, find themselves out of a job when they attempt to return to work. A Stanford University study of 400 cancer patients found that 6% were terminated after their treatment.(3) Another California study of 107 blue collar workers found that more than 10% were fired because of cancer-related discrimination.(2)

The fear of discrimination results in restricted job opportunities for cancer survivors. Many survivors report "job lock," feeling forced to stay in undesirable positions to avoid loss of hospital and medical insurance, pension rights and other benefits.(10)

"Job lock" is but one of the many negative impacts of cancer based discrimination. Survivors, as well as their families, employers and society as a whole, are harmed by employment decisions that are based on fear and ignorance instead of vision and fact.(11)

One reason for this discrimination is the erroneous belief that cancer is a death sentence. For example, one breast cancer survivor reported that she had been fired from her job as a paralegal shortly after having a mastectomy. She was unable to convince her employer that she lost her breast, not her brain, and would be able to live without it. The fact is that 50% of all individuals diagnosed with cancer in 1989 will overcome their illness.(12) Survival rates for individuals under the age of 55 -- those most likely to be employed -- are even higher, with rates of 80-90% for many types of cancer.

Another reason survivors lose their jobs is because of the myth that cancer is contagious.(13) One hotel kitchen employee was transferred from his job for fear that he might "contaminate" the food. A clerical worker in Michigan who returned to work after surgery for cancer of the larynx found that her co-workers had saturated her work area with Lysol for fear that they would catch her "cancer germs."

A third reason survivors are denied job opportunities is the myth that cancer necessarily destroys a worker's productivity.(14) For example, a senior executive in a large corporation who had demonstrated to his employer that he could perform his job while undergoing treatment for Hodgkin's disease, was nonetheless forced to resign because his superior feared he would no longer be a productive executive. Yet, studies have shown that cancer survivors have relatively the same productivity rates as other workers.(15)

Currently, no single statute protects cancer survivors, and others with a history of a serious illness, from employment discrimination. Only those individuals who work for employers covered by the Federal Rehabilitation Act of 1973 (employers who receive federal funding or federal contracts) are protected by federal law. Although on several occasions, Congress has attempted to amend Title VII of the Civil Rights Act of 1964 to include "handicap," all such amendments have failed.

Consequently, all individuals who are not covered by the Rehabilitation Act, the majority of American employees, must turn to state laws for relief. There, however, they find a patchwork of protections and remedies.

Every state has a law that, to some extent, regulates employment decisions based on disability. The scope of these laws, however, varies widely. (See attached chart). Some states laws (Alabama, Arkansas, and Mississippi) apply only to public employers or private employers that receive public funding. Delaware law applies only to employers with twenty or more employees. Georgia, Louisiana, and North Dakota provide no administrative remedies, so that a private claimant, who is often financially devastated by discriminatory acts, must risk the cost of a lawsuit to seek a remedy.

Other state laws protect only claimants who have substantial impairments, even if they have been discriminated against because their employer perceives them as being disabled. Walter Ray Ritchie, who was treated successfully for lymphatic cancer, sued the City of Houston, Texas Fire Department when it denied him a job solely because of his cancer history.(16) The federal district court ruled that the City violated Mr. Ritchie's rights under the Federal Rehabilitation Act because the City Fire Department, which receives federal funding, 1) regarded his cancer history as an impairment; 2) rejected him solely because of his cancer history without making an individualized determination of his medical conditions and his qualification; and 3) failed to establish that its medical standard was justified.

The court rejected, however, Mr. Ritchie's claim under the Texas Commission on Human Rights Act. Although the court ruled that he was physically qualified to be a fireman, he was not a protected "handicapped person" under the state law because the Act protects only individuals whose lives are substantially impaired by their handicaps. Essentially, Mr. Ritchie was healthy enough to be a fireman, but too healthy to be protected from employment discrimination by state law.

Texas is not the only state which provides very limited protection from disability-based discrimination. Considering only one factor -- the type of individual protected by state handicap discrimination statutes -- the American with Disabilities Act would expand the rights of individuals living in Alabama, Connecticut, Delaware, Kansas, Kentucky, Minnesota, Nebraska, Nevada, South Carolina, South Dakota, Texas, and Virginia. (See attached chart).

In addition to the definition of the protected class, many state laws provide less protection that the proposed federal standards in a variety of substantive and procedural ways, including the availability of a public agency to enforce the law, a duty to provide reasonable accommodations, and a prohibition against pre-employment medical inquiries that are not job-related. These substantive and procedural safeguards would be made uniform by passage of the American with Disabilities Act.

The Rehabilitation Act, a product of congressional recognition that employment barriers further the social segregation of handicapped individuals (17), was passed in 1973 to expand the employment opportunities of certain handicapped individuals. Until Congress expressly mandates that employment discrimination by all private and public employers with a minimum number of employees, like racial and gender discrimination, is violative of federal law, cancer survivors, and 31,000,000 other Americans with a history of a disability, must turn to an inadequate patchwork of state laws for potential relief.

The Americans with Disabilities Act of 1989 is a carefully tailored solution that appropriately balances the rights of employers to hire only qualified workers with the rights of 36,000,000 Americans to equal job opportunities. On behalf of those 5,000,000 Americans with cancer histories, the National Coalition for Cancer Survivorship urges the passage of this important law.

Summary of State Handicap Discrimination Laws

(compiled from research conducted by the Employment Law Center of the Legal Aid Society of San Francisco)

State	Employer Covered	Protected Class	Enforced By
AL	public only	handicap	State Personnel Bd.
AK	public & private (min. 1 employee)	disability (H, P)	Comm'n. for Human Rights
AZ	public & private (min. 15 employees)	handicap (h, p)	Civil Rights Div.
AR	public & private employers that received public funds	handicap (h, p)	Grievance Review Cmt.
CA	public & private (min. 5 employees)	handicap (people who are not cured or rehabilitated) medical condition (cured or rehabilitated cancer survivors)	Fair Employment and Housing Dep't.
CO	public & private (min. 1 employee)	handicap (H, P)	Civil Rights Div.
CT	public & private (min. 3 employees)	disability (H)	Comm'n. on Human Rights and Opportunities
DE	public & private (min. 20 employees)	handicap (H, P)	Human Relations Comm'n (private employees) Office of State Personnel (public employees)
DC	public & private (min. 1 employee)	handicap (H, P) (specifically includes cancer)	Comm'n on Human Rights
FL	public & private (min. 15 employees)	handicap (h, p) (specifically includes cancer)	Comm'n on Human Relations
GA	public & private (min. 15 employees)	handicap (H, p)	Fair Employment Practice Board (public employees) State court (private employees)
HI	public & private (min. 1 employee)	handicap (H, P)	Dep't. of Labor and Industrial Relations
ID	public & private (min. 10 employees)	handicap (H, P)	State court
IL	public & private (min. 1 employee)	handicap (H, P)	Dep't. of Human Rights

State	Employer Covered	Protected Class	Enforced By
IN	public & private (min. 6 employees)	handicap (h, p)	Civil Rights Comm'n.
IA	public & private (min. 4 employees)	disability (H, P)	Civil Rights Comm'n.
KS	public & private (min. 4 employees)	handicap	Comm'n on Civil Rights
KY	public & private (min. 8 employees)	handicap	Dep't. of Workplace Standard
LA	public & private (min. 15 employees)	handicap (H, P)	State court
ME	public & private (min. 15 employees)	handicap (H, P)	Human Rights Comm'n.
MD	public & private (min. 15 employees)	handicap (H, P)	Comm'n. on Human Relations
MA	public & private (min. 6 employees)	handicap (H, P)	Comm'n. Against Discrimination
MI	public & private (min. 4 employees)	handicap (H, p)	Dep't. of Civil Rights
MN	public & private (min. 1 employee)	handicap (H, P)	Dep't. of Human Rights
MS	public & private employers that received public funds	disability and handicap	State Personnel Comm'n.
MO	public & private (min. 6 employees)	handicap (H, P)	Comm'n. on Human Rights
MT	public & private (min. 1 employee)	handicap (H, P)	Human Rights Comm'n.
NB	public & private (min. 15 employees)	disability	Equal Opportunity Comm'n.
NV	public & private (min. 15 employees)	handicap	Equal Rights Comm'n.
NH	public & private (min. 6 employees)	handicap (H, P)	Comm'n. for Human Rights
NJ	public & private (min. 1 employee)	handicap (H, P)	Div. on Civil Rights
NM	public & private (min. 4 employees)	handicap (H, P)	Human Rights Comm'n.
NY	public & private (min. 4 employees)	disabilty (H, P)	Div. of Human Rights
NC	public & private (min. 15 employees)	handicap (H, P)	Human Relations Council
ND	public & private (min. 10 employees)	disability and handicap (h, p)	State Personnel Comm'n. (public employees) State court (private employees)
OH	public & private (min. 4 employees)	handicap (H, P)	Civil Rights Comm'n.
OK	public & private (min. 15 employees)	handicap (H, P)	Human Rights Comm'n.

State	Employer Covered	Protected Class	Enforced By
OR	public & private (min. 6 employees)	handicap (H, P)	Bureau of Labor Industries, Civil Rights Div.
PA	public & private (min. 4 employees)	disability and handicap (H, P)	Human Relations Comm'n.
RI	public & private (min. 4 employees)	handicap (H, P)	Comm'n. for Human Rights
SC	public & private (min. 15 employees)	handicap	Human Affairs Comm'n.
SD	public & private (min. 1 employee)	disability (H)	Human Rights Comm'n.
TN	public & private (min. 8 employees)	handicap (H, P)	Human Rights Comm'n.
TX	public & private (min. 15 employees)	handicap	Comm'n. on Human Rights
UT	public & private (min. 15 employees)	handicap (h, p)	Industrial Comm'n., Anti-Discrimination Div.
VT	public & private (min. 1 employee)	handicap (H, P) (specifically includes cancer)	Civil Rights Div.
VA	public & private (min. 1 employee)	disability (H)	Dep't. for Rights of the Disabled and Council on Human Rights
WA	public & private (min. 8 employees)	handicap (H, P)	Human Rights Comm'n.
WV	public & private (min. 12 employees)	handicap (H, P) (specifically includes cancer)	Human Rights Comm'n.
WI	public & private (min. 1 employee)	handicap (H, P)	Dept. of Industry, Labor and Human Relations, Equal Rights Div.
WY	public & private (min. 2 employees)	handicap (H, P)	Fair Employment Comm'n.

H = History of a handicap covered by statute or regulation
P = Perceived handicap covered by statute or regulation
h = History of handicap likely to be accepted by enforcing agency
p = Perceived handicap likely to be accepted by enforcing agency

Notes

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AMERICAN FEDERATION
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June 2, 1989

The Honorable Tom Harkin, Chairman
Subcommittee on the Handicapped
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Re: S. 933, Americans With
Disabilities Act

Dear Mr. Chairman:

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) commends you and your cosponsors for introducing S. 933, the Americans with Disabilities Act of 1989. We urge the Subcommittee to report the bill promptly so that enactment of this much-needed legislation can be completed in this session of Congress.

The AFL-CIO strongly supports the passage of a comprehensive federal law that affords the more than 40 million people with disabilities, who make up this country's largest minority group, civil rights protection equal to the protection already enjoyed by other minorities and by women.

S. 933 addresses the need for a coherent and uniform federal policy to assure citizens with disabilities the same rights to opportunity and independence as others in this country. Removing barriers to full participation in everyday life -- that is, in public and private employment, in public facilities and transportation, and in communication -- is essential if the millions of disabled individuals are to have more than a poverty-level existence. Inaccessible work environments, the stereotyped and discriminatory attitudes of many employers, and the lack of necessary skill training all hinder the efforts of those with disabilities to become part of the economic mainstream.

The AFL-CIO's Human Resources and Development Institute

(HRDI) has shown that employers and workplaces can indeed accommodate the work-related needs of persons with disabilities, and benefit from their participation. Over the past 12 years, HRDI has placed more than 4,000 workers with disabilities in high-level competitive employment.

The adoption of the A.D.A. will accelerate placements for persons with disabilities by increasing the public's awareness of the inherent work potential of workers with disabilities.

We look forward, Mr. Chairman, to working with you and your colleagues in both Houses to obtain enactment of this important Act.

Sincerely,

Robert M. McGlotten

Robert McGlotten, Director
Department of Legislation

Prepared Statement of the Associated General Contractors of America

The Associated General Contractors of America welcomes the opportunity to comment on S.933, "The Americans with Disabilities Act of 1989." AGC shares the goals of the authors of this legislation: to eliminate discrimination against individuals with disabilities. While AGC strongly supports legislation to prevent discrimination against individuals with disabilities, our review of the proposed legislation discloses an aspect of this well intentioned legislation which is of concern.

As currently drafted, the legislation would have an adverse impact on the business community's efforts to discourage illegal drug use, and the bill may even counter the thrust of the Drug-Free Workplace Act of 1988. As this committee is well aware, illegal drug use raises major social and moral issues. It also imposes major costs on the economy. The construction industry has found that drug use reduces productivity and increases accident rates. It also increases absenteeism, theft, and turnover.

Recent studies reveal that as many as 23 percent of all American workers use drugs on the job, and that drug use may account for over half of all accidents in the workplace. Some AGC members have found that 30 to 50 percent of their job applicants cannot pass pre-employment drug tests. One AGC member recently found that 40 percent of the employees tested after workplace accidents had used drugs.

AGC believes that drug use threatens the lives and limbs of all construction workers, and members of the public. Quite apart from the social, moral and economic issues, the need to provide safe construction jobsites requires the construction industry to reject any level of drug use in the workplace. AGC's longstanding policy is to accept no drug impairment on the construction site.

Just last year, Congress expressed strong suopport for AGC's position on drugs in the workplace. The Drug-Free Workplace Act of 1988 requires most federal contractors to certify to the contracting agency that they will:

- inform each employee that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the workplace is prohibited;

- take disciplinary action (up to and including termination) against employees who violate this prohibition;

- establish drug awareness programs to inform each employee about the dangers of drug use in the workplace; and

- make good faith efforts to maintain drug-free workplaces.

S.933 provides, however, that an employer may only require that the "current use of alcohol or drugs by an alcoholic or drug abuser does not pose a direct threat to property or the safety of others in the workplace...." Thus, the bill requires employers to make difficult if not impossible case-by-case determinations of the immediate dangers of an individual's drug use, in disregard of the large body of evidence that drug use in the workplace-- and particularly on a construction jobsite -- is inherently dangerous.

Further, S.933 addresses the question of drug use in the section on "qualification standards," where the bill places the burden of proof on the employer. AGC does not believe that the burden should be placed on the employer. To the contrary, AGC believes that drug use should be specifically excluded from the bill's definition of "disability."

The Drug-Free Workplace Act requires that federal contractors certify that they will maintain a drug-free workplace. S.933 does not comport with that federal directive and our nation's overall policy on drug use.

CONCLUSION

In closing, AGC would like to thank the Committee for the opportunity to express these views. While this legislation has many laudable goals, AGC hopes that the Committee will take the time to assure that the bill covers individuals who are genuinely deserving of protection and does not shield, even inadvertently, individuals who continue to fuel the nation's illegal drug traffic.

National
Organizations
Responding to
AIDS

TESTIMONY

on

THE AMERICANS WITH DISABILITIES ACT OF 1989

submitted to

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

May 9, 1989

a coalition convened by
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AIDS Action Council
AIDS National Interfaith Network
American Association for Counseling and Development
American Association for Marriage and Family Therapy
American Baptist Churches U.S.A.
American Civil Liberties Union
American College Health Association
American Foundation for AIDS Research
American Nurses Association
American Psychiatric Association
American Public Health Association
American Social Health Association
Americans for Democratic Action
Association for Retarded Citizens
Center for Population Options
Child Welfare League of America
Chronic Fatigue Syndrome
Church of the Brethren, Washington Office
Church Women United
Committee for Children
Disability Rights Education and Defense Fund, Inc.
Episcopal Church
Evangelical Lutheran Church in America, Lutheran Office for Governmental Affairs
Friends Committee on National Legislation
Human Rights Campaign Fund
National AIDS Network
National Association of Counties
National Association of People with AIDS
National Association of Protection and Advocacy Systems
National Association of Social Workers
National Association of State Alcohol and Drug Abuse Directors
National Council of Churches
National Council on Alcoholism
National Council on La Raza
National Family Planning and Reproductive Health Association
National Gay and Lesbian Task Force
National Hospice Organization
National Mental Health Association
National Minority AIDS Council
National Network of Runaway and Youth Services
National P.T.A.
National Puerto Rican Coalition
Presbyterian Church U.S.A., Washington Office
Rainbow Lobby
Synagogue Council of America
Union of American Hebrew Congregations
Unitarian Universalist Association of Congregations, Washington Office
United Church Board for Homeland Ministries
United Church of Christ, Office for Church in Society
United Methodist Church, Issue Developmental and Advocacy Unit of the General Board of Church and Society

Mr. Chairman and members of the Committee, the National Organizations Responding to AIDS (NORA) coalition is pleased to provide testimony on the importance of the Americans with Disabilities Act, with a particular focus on anti-discrimination protections for people with HIV-related conditions.

National Organizations Responding to AIDS (NORA) is a coalition of more than 130 national organizations dedicated to a sound public policy response to the AIDS/HIV epidemic. The coalition is convened by the AIDS Action Council, the only national lobby dedicated solely to the challenges of the epidemic.

This testimony is primarily comprised of the work of the AIDS National Interfaith Network, a coalition representing a wide variety of local, regional and national religious AIDS programs, and the offices of national religious organizations, who have gathered more than 50 personal stories of the discrimination which people with HIV related diseases and their families have confronted throughout our country.

The NORA coalition has chosen the Americans with Disabilities Act as the centerpiece of its legislative agenda. Many commissions, panels and experts have agreed: anti-discrimination is the keystone for the nation's response to this epidemic. Perhaps the President's Commission on the HIV Epidemic, chaired by Admiral Watkins, stated it best when they recommended:

> Comprehensive federal anti-discrimination legislation which prohibits discrimination against persons with disabilities in the public and private sectors, including employment, housing, public accommodations, and participation in government programs, should be enacted. All persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation.

The recommendation's subsequent endorsements by President Bush and all major AIDS advocacy groups bring us to today's introductory hearings. It may be timely that, one year after the Watkins Commission, the U.S. Congress has before it the legislative vehicle for implementation. Our only hope is that on the two year anniversary we will have already attended the signing ceremony for this essential bill.

The NORA coalition is actively participating in the coalition efforts spearheaded by the Consortium for Citizens with Disabilities. The discrimination faced by people with HIV infection and AIDS is as devastating as the discrimination faced by citizens who use wheelchairs, those with communication disorders, learning disabilities, addictions or developmental disabilities. A broad-based anti-discrimination bill that extends federal protections to the private sector must be the top priority for the U.S. Congress and each of our constituencies. You have our assurance of commitment and hard work in a partnership toward passage of the Americans with Disabilities Act.

A diagnosis of HIV infection and its related diseases is clearly a devastating event in a person's life. The subsequent acts of irrational discrimination that occur have been one of the unfortunate hallmarks of our nation's response to the HIV epidemic A review of the front page headlines over the past eight years will awaken in most of us the urgent need for a bill like the Americans with Disabilities Act. Remember: Ryan White -- denied entry to school; the Ray family -- burned from their home; a woman with AIDS -- denied entry with her children to a public swimming pool; a bright young attorney -- forced into poverty because he was fired from his job.

These stories and hundreds like them provide the impetus for action for the members of the NORA coalition and millions of compassionate and concerned Americans.

We would like to highlight for the committee a few of the real-life stories of our neighbors, gathered through the work of the AIDS National Interfaith Network, who are today experiencing discrimination simply because they or someone they love has HIV/AIDS. The majority of the cases contained within this testimony relate to employment discrimination as we know you will hear testimony on public accommodation tomorrow. Also included are some stories of people and communities who have responded with dignity.

There are two things that became apparent in reading the collection of discrimination stories we received. First, 75% of letters received were from America's heartland: Macon, Georgia; Newburgh Heights, Ohio; Wood Dale, IL; Bedford, Texas; Madison, Wisconsin; Lindsborg, Kansas; Iowa City, Iowa; and Moscow, Idaho. This is in keeping with the changing demographics of HIV disease. The Public Health Service estimates that by the end of next year, 1990, over half of all AIDS cases will occur in our heartland, not in the larger cities of the East and West Coasts.

Second, the letters reveal not only the pain of discrimination faced by persons living with AIDS, but the pain of discrimination faced by their families and caregivers (and the tremendous level of fear of discrimination and ostracism). It is clear that the Americans With Disabilities Act of 1989 will not only provide protections to the estimated 1 1/2 million Americans infected with the virus and those with AIDS, but its benefits are also needed by the millions of family members and caregivers who face the same discrimination as those with AIDS. Let us begin by looking at one case of employment discrimination faced by a caregiver to a person living with AIDS.

Etheline Dubin is a 64 year old Senior Social Work Assistant in New York City. She worked for eleven and a half years in a nursing home in Brooklyn, New York. In October 1988 she was assigned the case of a 34 year old man who was in the nursing home due to a debilitating stroke. In December 1987, the man tested positive for HIV antibodies but was asymptomatic. When Ms. Dubin took over his case, she learned that the man had not been allowed out of his room since he had tested positive for the virus. In essence, he was confined to solitary with few services for over 10 months.

After reviewing doctor's orders, which stated that the patient should be allowed to participate in all nursing home functions, Ms. Dubin took the patient out of his room to let him use the public telephone to call his two children. She was immediately fired for this action and told that the patient must be confined to his room because if other patients and their families found out the nursing home was serving an AIDS patient, the nursing home would go bankrupt.

Ms. Dubin only had 1 1/2 years to retirement. She has now lost all medical and pension benefits. At the age of 64, she is worried about finding other employment. Her being fired has had a devastating financial impact on her entire family.

Beverly Barbo of Lindsborg, Kansas is a mother of a son, Timothy, who died of AIDS two years ago. Like so many people, she did not become involved in working with people living with AIDS and their families until the disease hit home through her son's illness. She wrote of a case of employment discrimination that turned to terrorism when a professor of veterinary medicine at a state university in Kansas was diagnosed with AIDS. When word leaked out among his coworkers that he had AIDS, he was fired. While the professor lay dying in the bedroom of his home, people burned a cross on his front lawn, and a bullet was fired into his house. The professor died that day.

Employment discrimination due to the diagnosis of HIV and its related disease has the serious consequences of forcing independent, tax-paying citizens into being financially dependent wards of the government.

Steve Davis was an attorney working for an oil company in Oklahoma City, Oklahoma. He had been with the company for two years and had received rapid promotions and several pay raises due to the merit of his work. After being hospitalized with cryptococcus meningitis, an opportunistic AIDS infection, his employer was informed by the company's insurance firm that Mr. Davis had AIDS. He was fired the next day. He was told by his superiors that his department was undergoing "reorganization" and his services were no longer needed. Coworkers told Steve that such a reorganization never took place.

Facing unemployment and a catastrophic illness, Steve left Oklahoma City and his family to seek services and a more compassionate community in San Francisco. Since his original diagnosis, Steve has been quite sick on three occasions, but continues to do extensive volunteer work with Jewish Family and Children's Services and the Shanti Project in San Francisco. He trains volunteers to work with persons living with AIDS and makes speeches to educate the public about the epidemic. Through his volunteer work he is able to be a contributing member of this society.

A financially independent and taxpaying American who did have insurance coverage through his employer is now totally dependent upon the government for income and medical coverage. This is the cost we all pay for discrimination due to disabilities. Employment discrimination due to HIV infection, and health care financing for medical treatment, are inseparable issues in the AIDS epidemic. Pre-existing condition clauses in insurance policies usually prevent people with AIDS from securing medical coverage after termination from a group plan. Discrimination creates costly dependency. The story of Steve Davis is the same story told many times over in our collected discrimination diaries.

There are, however, a number of businesses and agencies around the country, including the federal government's Office of Personnel Management, who set personnel policies which do not allow discrimination against persons living with HIV. These firms retain people with HIV infection for as long as those individuals are able to fulfill their duties and responsibilities. We received several letters about such cases.

Mr. and Mrs. Russell D. Gray of Las Cruces, New Mexico, wrote about their son, Russell Gray, Jr.:

> Russell, Jr., was an Assistant District Attorney in Albuquerque, N.M., and was doing an outstanding job. He got his law degree from the University of New Mexico. He passed the bar exam soon after getting his degree. In September, 1988, he was diagnosed as having AIDS. In September he began to suffer weakness and loss of weight, and he informed his employer, the District Attorney, of his condition. The staff and District Attorney were extremely sympathetic and understanding. The staff changed his assignments to suit his lack of strength and endurance and kept him on the job until it was impossible to get to work. Thus, his income and insurance was continued as long as possible.
>
> His fellow employees have continued to visit him and express their concern for him. These employees do not seem to be concerned about being around him or of touching him.
>
> We, Russell, Jr.'s parents, are active members of St. Paul's Methodist Church in Las Cruces, New Mexico. We love our son very much and try to be supportive during his sickness.

The public health experts for the past eight years have told us that discrimination hampers public health efforts to contain the spread of HIV. The following letter from a person in Seattle, Washington, fearful of using his/her name, clearly makes the point:

> "I am submitting this anonymously because public knowledge of my HIV-positive status could make my life more difficult. I would face the possible loss of my job. Without my job (my only source of income), I would have to depend on government support for my health care. Getting out of bed each morning knowing you are a member of an often hated minority is very traumatic and very stressful. Add to that the fact that I carry a virus that can cripple my immune system and ravage my body with opportunistic infections. And on top of all that, I have to fear public knowledge of my HIV because of discrimination. I am a deserving citizen of this country. I (among many others) need the support of our government now more than ever. PLEASE, make the Americans with Disabilities Act a law, including protection of those of us who have tested HIV positive. If you do not you are only succeeding in driving us further underground. This could only aid in the uncontrolled spread of this horrible virus and disease."

In conclusion, Mr. Chairman, theses stories are a sample of the more than 50 we received from people throughout the country. There could be no more compelling reason for passage of the ADA than to offer redress for these stories and atrocities that have occurred.

We have as a nation the blessings of wealth and resources. We pride ourselves on our compassion and spirit. In passing the ADA, the Congress will embody the best of the American spirit and send a needed message that equal rights and compassion are standards this nation will uphold with pride and vigilance.

Thank you.

The President's Committee on Employment of People With Disabilities

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Dignity, Equality, Independence Through Employment

June 7, 1989

The Honorable Tom Harkin
Chairman, Subcommittee on the Handicapped
Senate Hart Office Building 113
Washington, D.C. 20510-6300

Dear Senator Harkin,

Thank you for the opportunity to respond to the questions addressed in your letter of May 19th. I regret that I was unable to respond to your questions regarding the employment provisions of the proposed civil rights legislation for people with disabilities within the specified time period. The questions reflect a sincere commitment to civil rights for individuals with disabilities and fairness to all affected by implementation of such legislation. I commend you and Senator Hatch in this effort.

My responses to your questions reflect the experience of the President's Committee on Employment of People with Disabilities in making the business community aware of the employment potential of people with disabilities. They do not represent a detailed legal or policy analysis.

1. In the substantive standards in the employment section, the bill says the term "discrimination" includes the failure to make reasonable accommodations unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business."

Is the EEOC's definition of undue hardship (29 CFR Section 1613.704(c)) your understanding of what "undue hardship" is?

Yes. This same definition is applicable under Section 504, as well. See, e.g., 45 CFR Sec. 84.12(c)(1978).

2. The bill includes as discrimination the use of "qualification standards, tests, selection criteria or eligibility criteria that identify or limit, or tend to

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identify or limit, a qualified individual with a disability..., unless such standards, tests, or criteria are shown by [the covered] entity to be necessary and substantially related to the ability of an individual to perform the essential functions" of the job. Section 202(b)(3).

(a) This language could be very onerous. Few employers may be able to show this or that job related criterion is absolutely necessary. Could you comment on this?

> An employer with 15 or more employees should reasonably be able to describe what tasks a certain position is expected to accomplish and identify the requisite functions for an individual to accomplish those tasks. The employer should then be able to describe how the particular criterion is necessary either to identify persons able to perform such tasks or to screen out those who are not able to do so. With such a description, an employer can show how the criterion is necessary and substantially related to the essential functions of the job. The language of the legislation does not appear to require that such criterion be "absolutely" necessary, as implied in your question.

(b) Do you have objections to the use of alternative language, currently found in EEOC regulations, which provides, with respect to criteria that disproportionately screen out persons with disabilities, (1) that criteria and tests be job-related to the position in question and (2) that alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not available? [29 CFR Section 1613.705 (a)]

> The EEOC-promulgated regulations for Section 501 focus on the effect of criterion on groups of persons with disabilities. This would appear to pose some problems in the applicability of this alternative language to the individual approach of the ADA language.
>
> Further, the EEOC regulations apply only to criteria which disproportionately exclude groups of persons with disabilities. Once again, the intent of the ADA to focus on the ability of an individual to perform the essential functions of the job may not be well served by the statistical group approach of the alternative language. Moreover, existing statistics on people with disabilities in the private sector labor force are inadequate or nonexistent, making it difficult or impossible to apply such a standard.
>
> Finally, the availability of alternative job-related tests or job criteria which do not screen

> out persons with disabilities is determined by the Office of Personnel Mangagement under the current enforcement practices of Section 501. Is it the intent of the alternative language to give authority to a governmental agency for determining what job-related tests may be used by employers?

3. The employment section's effective date is the date of enactment. Many employers are going to be confused about their responsibilities and many will need time to understand them, as well as prepare to make the necessary accommodations for persons with disabilities. Title VII of the 1964 Civil Rights Act, banning employment discrimination based on race, color, national origin, religion, and gender was effective one year after date of enactment. Is there any reason not to have the same one year effective date we had in the parallel civil rights statute?

> I am mindful of the very real acts of discrimination which individuals with disabilities face every day that the protections of civil rights statutes do not have the force of law. Therefore, any period, prior to employment discrimination protections becoming effective, must include a concerted program of education and preparation.

4. Is the bill's definition of "reasonable accommodations" at Section 3(3) consistent with current Section 504 regulations? For example, under Section 504, if a person with a disability is no longer able to perform the job he or she is in, must the employer reassign the person a job he or she can do?

> I believe it is the intent of the supporters of comprehensive civil rights legislation to see the provisions of such legislation be consistent with those provisions of Section 504 which have been proven effective.
>
> The Supreme Court, in School Board of Nassau County v. Arline, 107 S.Ct. 1123, 1131 n.17 (1987), stated that "(e)mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." This policy should stand.

Does the employer under the bill have to bump an incumbent employee or create a new job to effectuate the reassignment?

> Employers should not be required to remove or bump an

incumbent employee involuntarily from a position. While some companies do make reasonable inquiries of workers who may be willing to transfer positions voluntarily to enable an individual with disabilitities to work there, this practice probably should not be mandatory. Creation of a new job to effectuate the reassignment should not be required.

5. Do you have an estimate of the net dollars we can save by opening up employment opportunities on a fair basis to persons with disabilities and thereby reducing dependency?

The analysis of the costs, benefits and inflationary impact of implementing Section 504 anticipated a yield of $1 billion annually in increased employment and earnings for people with disabilities. In addition to increasing the Gross National Product, it was estimated that such an earnings increase by workers with disabilities would result in some $58 million in additional tax revenues to Federal, State and local government. The study's methodology, outlined in the Federal Register (Vol. 41, No. 96. Monday, May 17, 1976), may be appropriate for a similar projection of returns which may be produced with the passage of the comprehensive civil rights legislation.

I do hope that the psychic values intrinsic to the decision to enact civil rights protections can be identified. The participation of a person with a disability in the electoral process at the political party level, or opportunities for people with disabilities to do volunteer work in their communities are examples of concrete returns to society in the form of human spirit instead of dollars and cents.

Once again, thank you for this opportunity to respond to the questions posed by the Committee. The President's Committee on Employment of People with Disabilities wishes to continue to cooperate with the Committee's efforts to draft effective and workable civil rights protections for all individuals with disabilities.

Sincerely,

Harold Russell

Harold Russell
Chairman

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WRITER'S DIRECT DIAL NUMBER

OUR FILE NO:

May 26, 1989

Senator Tom Harkin
Chairman
Subcommittee on the Handicapped
United States Senate
Committee on Labor and Human Resources
Washington, D.C. 20510-6300

Dear Senator Harkin:

Thank you for your recent letter, and your kind words regarding my testimony on behalf of the Chamber of Commerce of the United States regarding the Americans with Disabilities Act of 1989, S.933. I have reviewed Senator Hatch's questions with representatives of the Chamber of Commerce, and we are pleased to supplement our testimony and written statements on this important piece of legislation. We hope these responses prove useful to you and your colleagues as you consider this bill.

We reiterate that the Chamber of Commerce fully supports the elimination of unnecessary barriers to the employment of the disabled. Our concern with the Americans with Disabilities Act, as currently drafted, lies not in the legislative goal but with the means selected to reach that goal. As noted below, many of Senator Hatch's questions reflect similar concerns about the clarity of the proposed statutory language, and about the breadth of the obligations the statute would impose upon private employers throughout the country.

Question No. 1: In the substantive standards in the employment section, the bill says the term "discrimination" includes the failure to make reasonable accommodations unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business."

Is the EEOC's definition of undue hardship (29 C.F.R. Section 1613.704(c)) your understanding of what "undue hardship" is?

Answer No. 1: This question raises several significant concerns that we previously have discussed. As we stated in our submission, we are concerned that the bill apparently would impose upon all private employers, regardless of size, financial obligations heretofore considered appropriate only for recipients of federal financial assistance and the federal government itself. We believe it is one thing to require institutions receiving substantial federal funds to use a part of those monies to ensure that the workplace is as hospitable as possible to the disabled; it is quite another to require precisely the same actions, and the same levels of expenditure, on behalf of all private employers as a matter of positive law. Similarly, we believe there is a substantial difference between the obligations of the federal government to its disabled citizens, who as citizens are entitled to demand that the government spend their tax dollars in socially beneficial ways, and the obligations of private sector employers trying desperately to compete in a global economy.

The definition of "undue hardship" contained in the EEOC regulations mentioned in this question, and in the Department of Labor's regulations implementing Section 504 of the Rehabilitation Act, 29 U.S.C. Section 794, see 29 C.F.R. Part 32, Section 32.13(b), is premised upon a broad and expansive view of employer and agency obligations. We do not believe these regulations should govern the obligations of all private employers, for the reasons expressed above.

We agree, of course, that the specific criteria mentioned in the EEOC regulations are relevant to gauging the economic and operational impact of a particular form of accommodation upon any employer. We do not agree that these are the sole relevant criteria in assessing the impact of a proposed accommodation upon an employer's business, and fully support the alternative and more expansive criteria suggested by the American Society of Personnel Administrators in their response to this inquiry.

We are troubled, however, that neither the current regulations nor the proposed bill provide any standard by which the obligations of an employer are to be measured. Even assuming the bill could identify all of the appropriate factors for inquiry, the term "undue hardship" is not specific and would allow the courts and agencies to create widely differing definitions based upon their subjective judgment of what is "undue" in any given situation.

For this reason, we believe it is imperative that Congress specify what standard the courts and agencies should use in determining whether an employer has satisfied its obligations under law. What is the standard by which "undue hardship" is to be measured? Is the standard to be a non-discrimination standard, similar to that used in religious discrimination cases under Title VII of the Civil Rights Act of 1964, see 29 C.F.R. Section 1605.2 (EEOC regulations)? Should the standard be similar to that used under Section 504 of the Rehabilitation Act, with its implicit premise of making the federal and federal grantee workplace as hospitable as possible to the disabled? Or should an entirely new standard be created?

We suggest that the primary purpose of the employment provisions of this bill should be elimination of arbitrary barriers to the employment of the disabled; this plainly accords with the testimony of groups representing the disabled community, who repeatedly stressed that they were looking only for fair treatment and the elimination of artificial barriers that have placed them outside the mainstream of American economic life. We further suggest that this goal can be served fully by adopting the undue hardship standard associated with religious discrimination cases under Title VII. As Senator Harkin pointed out at substantial length at the hearing, many of the accommodations required to allow the full employment of the disabled are one-time measures that are not expensive. Such expenditures as these presumably would not constitute an "undue hardship" under the Title VII standard. See 29 C.F.R. Section 1605.2(e). Moreover, a clear prohibition upon employment discrimination against the disabled itself would be a powerful spur for employers to eliminate arbitrary barriers and devise cost-effective means to integrate disabled employees and applicants into the workplace. Use of an "undue hardship" standard similar to that employed under Title VII also would make it clear that broader forms of accommodation -- such as the mandatory hiring of readers or interpreters -- are not required as a matter of course by all private employers. The costs associated with such forms of accommodation might truly be enormous, and well beyond the means of many if not most employers. See, e.g., Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983). To the extent that the bill contains a clear limit on these costs -- which would be provided by reliance upon the Title VII standard of "undue hardship" -- we believe the bill's chances of passage also would be enhanced significantly.

Question No. 2: The bill includes as discrimination the use of "qualification standards, tests, selection criteria or eligibility criteria that identify or limit, or tend to identify or limit, a qualified individual with a disability ..., unless such standards, tests, or criteria are shown by [the covered] entity to be necessary and substantially related to the ability of an individual to perform the essential functions" of the job.

(a) The language could be very onerous. Few employers may be able to show that this or that job-related criterion is absolutely necessary. Could you comment on this?

(b) Do you have objections to the use of alternative language, currently found in EEOC regulations, which provides, with respect to criteria that disproportionately screen out persons with disabilities, (1) that criteria and tests be job-related to the position in question and (2) that alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not available? [29 C.F.R. Section 1613.705(a)].

Answer No. 2: The statutory language referred to in this question is extremely unwise, for several reasons. First, it assumes that it is possible to identify the "essential functions" of a job, a fallacy upon which we previously have commented. Such language would give the courts and agencies the ability to determine that certain portions of jobs be eliminated totally from the workplace, on the grounds that they were not sufficiently "essential." We have no difficulty with the proposition that employers should be precluded from imposing arbitrary barriers to employment, and that reasonable efforts to shift work or restructure jobs should be part of an accommodation requirement. *See, e.g.*, *American Postal Workers Union v. Postmaster General*, 35 Fair Employment Practice Cases (BNA) 1484 (N.D. Cal. 1984); *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979). We believe, however, that the problem of job restructuring properly is dealt with through the reasonable accommodation requirement, and not through an open-ended invitation to the courts, agencies and juries throughout the country to decide that certain aspects of a job are not "essential" enough to be continued.

Second, as this question points out, the language in the bill unnecessarily and unwisely departs from well-accepted standards used for years under Title VII. The law under Title VII requires that employment tests or selection criteria that have a disparate or screening impact upon the employment of minority groups be job-related and that alternative job-related measures with lesser impact be unavailable. *See generally* B. Schlei and P. Grossman, *Employment Discrimination Law* (BNA, 1983), at 91-92. These requirements have been refined through substantial litigation, including Supreme Court decisions in landmark cases such as *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) and *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975). The testing standards under Title VII have provided a workable compromise of the interests of employers and protected groups cutting across the entire employment discrimination spectrum; there is absolutely no reason to discard 25 years of experience and invent another standard in the field of discrimination against the disabled.

Moreover, even if there were some reason for a new standard, the language in the current bill would not be an appropriate standard under any circumstances. The proposition that a particular test or selection criterion be shown to be "necessary" in order to be used would make it impossible for employers ever to defend a test. It is difficult to imagine a test or selection criterion that is "necessary", in the sense that alternative measures are completely unavailable. Alternative selection criteria almost always are available for any given requirement. The question thus cannot be whether the particular selection device chosen by the employer is the only one available, which it almost never will be, but whether that device fairly measures the individual for the job, and whether equally effective alternative measures are available that have a lesser impact upon the employment of disadvantaged groups. This standard is reflected in the EEOC regulations referred to in this question, and they -- not some wholly new and unnecessary standard -- should govern selection criteria under any statute dealing with the employment of the disabled.

Question No. 3: The employment section's effective date is the date of enactment. Many employers are going to be confused about their responsibilities and many will need time to understand them, as well as to prepare to make the necessary accommodations for persons with disabilities. Title VII of the 1964 Civil Rights Act, banning employment discrimination based on race, color, national origin, religion, and gender was effective one year after date of enactment. Is there any reason not to have the same one year effective date we had in the parallel civil rights status?

Answer No. 3: We would support a phase-in period, allowing employers to become acquainted with the new law's requirements and to decide how best to ensure that reasonable accommodation of the disabled may be accomplished. While many employers already are covered by Sections 503 and 504 of the Vocational Rehabilitation Act of 1973, one of the principal purposes of the Americans with Disabilities Act is to extend the proscription upon employment discrimination to additional private employers. We believe it is wise to allow these new employers to become aware of the new law and implement programs to ensure voluntary compliance with its provisions.

We also would note that in addition to the delay in Title VII's effective date noted in the question, delays in effective dates or enforcement have been undertaken in many other recent statutes, including the Immigration Reform and Control Act. We believe similar treatment is wholly appropriate here.

Question No. 4: Is the bill's definition of "reasonable accommodations" at Section 3(3) consistent with current Section 504 regulations? For example, under Section 504, if a person with a disability is no longer able to perform the job he or she is in, must the employer reassign the person a job he or she can do?

Does the employer under the bill have to bump an incumbent employee or create a new job to effectuate the reassignment?

Answer No. 4: The bill's definition of "reasonable accommodation" is not congruent with existing Section 504 standards, and may lead to serious problems in interpretation. We already have expressed our views on the definition of "reasonable accommodation" contained in the bill, which apparently is drawn from the language of the EEOC and Department of Labor Regulations mentioned above. Compare S.933, Section 3(3) with 29 C.F.R. Section 1613.704(b) (EEOC regulation) and 29 C.F.R. Section 32.3 (OFCCP regulation). We would note, however, that this bill, unlike the EEOC and Department of Labor regulations, states that "reasonable accommodation shall include" the various specified actions, as opposed to the permissive "may include" language of the regulations. We suggest that if Congress wishes to rely upon this or any other language illustrating the types of acts that may satisfy a reasonable accommodation requirement, inclusion of the non-mandatory language of the regulations would preserve the discretion of the courts and implementing agency (if any) to require an accommodation appropriate to the situation at hand, without demanding that the types of accommodation mentioned in the statute be imposed in every case.

The expansive definition of reasonable accommodation contained in the statute raises numerous problems, as we previously have stated. For example, the proposed statutory language states that reasonable accommodation "shall include ... reassignment ... adoption or modification of procedures or protocols ... the provision of qualified readers or interpreters...." Once again, we strongly urge Congress to consider carefully such vague language and standards. If it is not the Senate's intent to require the hiring of readers and interpreters by every employer in the United States -- and even the witnesses for the disabled community have not demanded two for one hiring -- the statutory language must be clarified. For much the same reason, we support the elimination of the phrase "adoption or modification of procedures or protocols" from the definition of reasonable accommodation. This phrase is not contained in either the Department of Labor or EEOC implementing regulations, and is just the type of vague language that could be construed by the courts and agencies to impose duties upon employers well beyond the intent of Congress. We are unaware of any problem in current Section 504 jurisprudence that this phrase is designed to cure.

Finally, we note that existing Section 504 jurisprudence does not require an employer to create a new position for a disabled worker who no longer can perform his or her job with reasonable accommodation. Carter v. Tisch, 44 Fair Employment Practice Cases (BNA) 385 (4th Cir. 1987); Jasany v. Postal Service, 755 F.2d 1244 (6th Cir. 1985). None of the myriad federal employment discrimination statutes require the bumping of an incumbent employee in favor of a member of a protected group, even where the protected group member has been the victim of employment discrimination. See Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Spagnuolo v. Whirlpool Corp., 717 F. 2d 114 (4th Cir. 1983). There is no warrant for any broader statutory requirement for the employment of the disabled.

Question No. 5: Do you have an estimate of the net dollars we can save by opening up employment opportunities on a fair basis to persons with disabilities and thereby reducing dependency?

Answer No. 5: The Chamber of Commerce is not in a position to estimate the net cost savings that might be generated by ensuring equal opportunity on behalf of the disabled community. We recognize that eliminating unnecessary barriers to employment should reduce the number of unemployed disabled persons, thus reducing transfer payments made by the federal and state governments. We also recognize that productive employment of the disabled is essential to the dignity of the individual, wholly apart from the costs involved.

Our concern, however, is that the bill as presently written has the potential to impose truly enormous additional costs upon employers who, because of competitive constraints, may not be in a position to pass them on to society at large. Given the vague language of the bill, and the concomitant uncertainty about the scope of employer obligations imposed, it is difficult to estimate with any precision the costs associated with this measure. We have been made aware of a study conducted by the United States Department of Labor on the costs of implementing Section 504 requirements at some 17,945 locations. The cost associated with these requirements (modifications in parking, toilet facilities, entrance ramps, drinking fountains, communications facilities, etc.) was estimated at $127,850,000. To the extent that the current bill goes beyond Section 504 standards, it would impose even greater costs.

We believe it is vital to appreciate these costs in assessing the advisability of the bill as currently drafted. It is true that many accommodations in the workplace are easily and cheaply accomplished. It is not true that all accommodations required by this bill fall into this category. The potential economic impact of more substantial forms of accommodation upon the American economy warrants careful Congressional scrutiny, and far more careful language than is contained in the current bill.

I hope these answers are helpful to you and your colleagues. I again offer my services, and the services of the Chamber of Commerce, in achieving an appropriate statute in this important field.

Very truly yours,

Zachary D. Fasman
of PAUL, HASTINGS, JANOFSKY & WALKER

cc: Ms. Nancy Fulco
United States Chamber of Commerce

ZDF:ltw

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May 26, 1989

HAND-DELIVERED

Senator Tom Harkin
Chairman
Subcommittee on the Handicapped
United States Senate
Committee on Labor and Human Resources
Washington, D. C. 20510-6300

Dear Senator Harkin:

On behalf of the American Society for Personnel Administration, I very much appreciate your comments about our testimony before the Senate Committee on Labor and Human Resources.

We have reviewed Senator Hatch's questions and offer the following responses. In some instances, we have had to answer in general terms as we have not had the opportunity to survey our members and gather specific data. Nonetheless, we believe that the responses to these questions, as well as our testimony before the Committee, set forth our concerns and suggestions for modification of the Americans With Disabilities Act of 1989 so as to address some of the concerns of American employers. We reemphasize again, as we did in our testimony, that the American Society for Personnel Administration is fully supportive of a national and workable statute affording full employment rights to the disabled.

Question 1. In the substantive standards in the employment section, the bill says the term "discrimination" includes the failure to make reasonable accommodations unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business."

Is the EEOC's definition of undue hardship (29 CFR Section 1613.704(c) your understanding of what "undue hardship" is?

Answer 1. As presently drafted, S.933 provides no guidance regarding how the term "undue hardship" is defined. The failure of the drafters to set forth the criteria for determining "undue hardship" leaves the term undefined and subject to wildly varying interpretations by the Courts and employers which will be unsettled for years. We are therefore unable to answer whether the EEOC's definition of undue hardship contained in 29 C.F.R. § 1613.704(c) spells out the criteria to be evaluated by employers and the courts in interpreting the American With Disabilities Act of 1989.

Although the criteria contained in the EEOC regulations (and in regulations interpreting Section 504 of the Rehabilitation Act) would provide employers and the Courts with some guidance, they would also create uncertainty for a great many employers. Specifically, employers who are federal contractors governed by Section 503 of the Rehabilitation Act are subject to regulations which lists business necessity and financial cost and expenses, as factors which may be considered in determining "undue hardship." Clarification that these latter factors are the factors to be used in determining "undue hardship" under the Americans With Disabilities Act would help to prevent unnecessary confusion and litigation for employers.

We would urge that the definition of undue hardship comport with existing standards found in the implementing regulations of §§ 503 and 504 of the Rehabilitation Act. We believe that the following criteria should be among those applied to the analysis necessary to determine when the requested accommodation constitutes an undue hardship for the employer:

a. nature and cost of the requested accommodation;

b. size of employer facility and capacity for structural change;

c. size of workforce; impact on collective bargaining agreements;

d. existence of suitable alternative accommodation available at less cost; and

e. impact on employer productivity and competitiveness.

Question 2. The bill includes as discrimination the use of "qualification standards, tests, selection criteria or eligibility criteria that identify or limit, or tend to identify or limit, a qualified individual with a disability ..., unless such standards, tests, or criteria are shown by [the covered] entity to be necessary and substantially related to the ability of an individual to perform the essential functions" of the job. Section 202(b)(3).

(a) This language could be very onerous. Few employers may be able to show that this or that job related criterion is absolutely necessary. Could you comment on this?

(b) Do you have objections to the use of alternative language, currently found in EEOC regulations, which provides, with respect to criteria that disproportionately screen out persons with disabilities, (1) that criteria and tests be job-related to the position in question and (2) that alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not available? [29 CFR Section 1613.705(a)].

Answer 2. The language in Section 202(b)(3) is overly broad and goes far beyond the current requirements of equal employment law. The language of § 202(b)(3) would require employer review on an individual disability by disability basis of each qualification standard and then undertake a comparison of those to the identified "essential function" of each job in order to insure compliance. Particularly with regard to the proposed requirement to identify the "essential function" of each job, the statute will require extraordinary effort and expenditure of resources by employers without a discernible benefit for qualified disabled employees. Such a task would be so burdensome as to be impossible to many employers.

Further, the current state of employment test validation does not provide for the assurance of absolute necessity required by § 202(b)(3). The impact of § 202(b)(3) would be to significantly hinder the ability of employers to standardize their employment procedures. Such a result would inhibit compliance with the Americans With Disabilities Act as well as other equal employment laws without any appreciable gain in employment opportunities for the disabled.

Indeed, employers would be placed in the untenable position of having to comply with the requirements of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 with respect to compliance with Title VII and E.O. 11246, as amended, yet have a significantly different statutory obligation with respect to the same test or selection procedure for the same applicant or employee who might also be covered by the A.D.A. This type of statutory confusion should not be foisted on the employer community at a time when employment procedures are being reviewed to ensure maximum participation by our workforce.

The Department of Health and Human Services' interpretation of § 504, 45 C.F.R. § 84.13, and the EEOC's interpretation of § 501, 29 C.F.R. § 1613.705(a), adopt the accepted legal definition to deal with the impact of standardized tests or selection procedures for application to the disabled. As noted in your letter, those regulations provide, with respect to criteria that disproportionately screen out persons with disabilities, (1) that criteria and tests be job-related to the position in question and (2) that alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not available. The burden of demonstrating the existence of alternative criteria with less discriminatory impact was placed on the enforcement agency - or in the case of HHS, the Director of the Office of Civil Rights.

While still posing some problems for employers, this latter provision would, we believe, accomplish what the committee is seeking to accomplish, yet build on settled law. In short, it would provide more predictability to employers without any reduction in the protections afforded to persons with disabilities.

Question 3. The employment section's effective date is the date of enactment. Many employers are going to be confused about their responsibilities and many will need time to understand them, as well as to prepare to make the necessary accommodations for persons with disabilities. Title VII of the 1964 Civil Rights Act, banning employment discrimination based on race, color, national origin, religion, and gender was effective one year after date of enactment. Is there any reason not to have the same one year effective date we had in the parallel civil rights statute?

Answer 3. While many employers who are federal government contractors or federal grantees are already covered by § 503 or § 504 of the Rehabilitation Act, the broad scope of the Americans With Disabilities Act of 1989 and its application to the universe of employers ought to compel a reasonable period for employers to move to a compliance status. Litigation regarding failure to undertake reasonable accommodations as well as compliance with the other substantive requirements of the law can be avoided if employers are provided time to undertake the required restructuring of their work sites and work practices.

Question 4. Is the bill's definition of "reasonable accommodations" at Section 3(3) consistent with current Section 504 regulations? For example, under Section 504, if a person with a disability is no longer able to perform the job he or she is in, must the employer reassign the person a job he or she can do?

Does the employer under the bill have to bump an incumbent employee or create a new job to effectuate the reassignment?

Answer 4. As currently drafted, the bill's definition of "reasonable accommodations" are not consistent with current § 504 regulations. Furthermore, as presently drafted, we believe that an employer could indeed have to bump an incumbent employee or create a new job to effectuate the reassignment.

The jurisprudence under § 504 is settled that an employer does not have the obligation to create a new position for a qualified disabled employee who can no longer perform the work required of his or her job with reasonable accommodation. Carter v. Tisch, 44 FEP Cases 385 (4th Cir., July 1987); Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985). Similarly, there is no requirement under § 504, or indeed other statutory equal employment laws, for an employer to bump or remove an incumbent from a position in order to remedy an individual who has suffered employment discrimination. See Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986); Firefighters Local 1784 v. Stotts, 367 U.S. 561 (1984); United Steelworkers v. Weber, 443 U.S. 193 (1978); Title VII, Equal Protection Clause, Affirmative Action; Spagnulo v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983), ADEA.

In light of this commanding precedent, the language of § 3(3) ought to be reviewed. Specifically, the change in the requirements to implement reasonable accommodation from the discretionary "may" found in 29 C.F.R. 1613.704(b) to the mandatory "shall" found in § 3(3) will create extraordinary problems for employers and foster extensive unproductive litigation. The purpose of reasonable accommodation is to allow employers the flexibility to structure accommodations to the needs of the individual and the requirements of the job. Making mandatory the specific accommodations set forth in § 3(3) dramatically changes the nature of the requirement.

Further, we would note that the requirement of "adoption or modification of procedures or protocols" found in § 3(3) does not appear in 29 C.F.R. § 1613.704(b) or 45 C.F.R. § 84.12. This addition should be eliminated to insure that it not be used to impact on seniority provisions, policies regarding bumping or displacement of employees or requirements to redefine job requirements.

These questions regarding the scope of § 3(3) are particularly important due to the definition of discrimination found in § 202(b)(1) which defines discrimination as the failure to undertake reasonable accommodation. Thus, the mandatory requirement of § 3(3) and the use of the word "shall" ought to be revised consistent with established principles of equal employment law and interpretation of § 504.

Question 5. Do you have an estimate of the net dollars we can save by opening up employment opportunities on a fair basis to persons with disabilities and thereby reducing dependency?

Answer 5. We do not have the resources necessary to conduct the cost-benefit analysis of the impact of this bill for employees, the government, and the public at large by opening up employment opportunities on a fair basis to qualified persons with disabilities. We recognize that benefits are likely to be recognized to the federal government, through cost reductions in support payments of various types.

We also recognize that there will be benefits to employers, who will be broadening their pool of qualified workers, and thereby enriching and making their workforce more diverse. This may then translate into greater productivity and a healthier employer.

However, we also recognize that there will certainly be costs born by employers, which are also difficult to quantify. In analyzing the cost and benefits of implementing § 504 of the Rehabilitation Act of 1973, the Department of Labor estimated that the costs of modifications (accessible parking, toilet facilities, entrance ramps, entrances and doorways, drinking fountains, communications, etc.) of 17,945 of a possible 376,198 locations, at $127,850,000. If the programs receiving financial assistance from the Department of Labor can be compared to other places of business, the potential cost would be enormous.

I hope these answers are responsive to your questions and we look forward to working with the Committee to address other provisions contained in S.933 which must be clarified or revised.

Sincerely,

Lawrence Z. Lorber

LZL/ih

May 26, 1989

Senator Thomas Harkin
Chairman, Subcommittee on the Handicapped
United States Senate
Washington, DC 20510

Dear Senator Harkin:

It was an honor to testify on May 9, 1989 on the Americans With Disabilities Act. This legislation is indeed historic, as is your brilliant leadership. I would like to respond to the testimony presented by the American Society for Personnel Administration (ASPA) and the U.S. Chamber of Commerce (Chamber).

The testimony submitted by these organizations demonstrates confusion with the ADA provisions as well as current requirements governing employment under the 1973 Rehabilitation Act. As you correctly noted at the hearing, the ADA reflects time-tested principles in effect for 15 years under the Rehabilitation Act employment provisions. The claim by the ASPA and the Chamber that the ADA embarks on an uncharted course is simply unfounded.

I will specifically address each of the points made by ASPA and the Chamber to demonstrate the fallacy of their position. However, as a general matter, the testimony raises many red herrings in order to give the illusion of confusion and conflict in order to mask what appears to be a basic opposition to the non-discrimination principles of the ADA.

I). REBUTTAL TO ASPA TESTIMONY

A). Contrary to the Assertions of ASPA, the ADA Incorporates Section 504 Principles.

Although the entire text of ASPA's testimony mischaracterizes the Section 504 employment provisions in an attempt to demonstrate departures from Section 504 principles, in reality ASPA simply objects to extending Section 504 to the private sector. This position is reflected in the statement on page 10 of the ASPA testimony that "Section 504 is thus an imperfect model at best for private employers." That this is the actual position of ASPA is clear from a review of the assertions contained in the testimony.

1). Reasonable Accommodation

Reasonable accommodation in employment has been incorporated into Section 504's non-discrimination mandate since the promulgation of the original lead agency regulations in 1977. 45 CFR §84.12(a) provides that:

> A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of the program.

The Section 504 regulations of every federal agency since 1977 have adopted the reasonable accommodation in employment provisions. Hence, the statements that the reasonable accommodation requirement "is a clear affirmative action requirement ... rather than a legal standard against which to determine if an employer is guilty of discrimination" p 4, and that the " mixing of the Section 504 non-discrimination requirements with the Section 503 affirmative action obligations in the employment context will be unworkable" p 5, evidence either a misunderstanding or a mischaracterization of current Section 504 requirements.

2). Undue Hardship

Similarly, the limitation on accommodation of "undue hardship" has been the accepted standard for Section 504 (as well as Sections 501 and 503) since the original regulations in 1977. Yet ASPA makes the statement on p 9 that "In the employment context such a standard [undue hardship] will prove unworkable and create significant disincentives to employers". The undue hardship defense is workable, as over a decade of experience under the Rehabilitation Act demonstrates, and it also explicitly takes into account the employer's business interests. 45 CFR §84.12(c) provides:

> (c) In determining pursuant to paragraph (a) of the section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:
> (1) the overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget;
> (2) The type of the recipient's operation, including the composition And structure of the recipient's workforce; and

> (3) the nature and cost of the accommodation needed.
> (d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

3). Alexander v. Choate, 469 U.S. 297 (1985)

ASPA cites Alexander v. Choate in support of its contention that Section 504 does not include impact discrimination generally, or the employment provisions of the ADA specifically. pp 3,5. Ironically, Choate explicitly supports both. Choate specifically holds that an impact standard must be recognized under Section 504 if the Rehabilitation Act is to accomplish its goals, and notes that all of the courts of appeals have agreed that Section 504 reaches disparate impact discrimination. Id. at n.17.

As to reasonable accommodation, Choate eliminates any doubt left by Southeastern Community College v. Davis, 442 U.S. 397 (1979), by explicitly confirming that Section 504's non-discrimination mandate includes a reasonable accommodation obligation. Moreover, Choate specifically cites with approval 45 CFR §84.12, which requires reasonable accommodation in employment. Finally, Choate cites Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) as "holding that the 1978 Amendments to the Act were intended to codify the regulations enforcing § 504" 469 U.S. at n.24 (emphasis added). It is difficult to imagine a case that is more supportive of the ADA employment provisions than Alexander v. Choate.

4). Essential Functions

The ASPA claims that the reference in the ADA to the "essential functions" of the job requires that "[j]ob descriptions will have to be drafted with excruciating specificity ... such specificity would be impossible." pp 6-7. Again, the Section 504 Regulations have from the outset provided that a handicapped individual is qualified if he or she can perform the essential functions of the job. This has not been "excruciating", nor is it impossible.

5). Necessary and Substantially Related

The ASPA also states that the requirement that job criteria "can be shown to be necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position" Section 202(b)(3), is not workable. Not only has this been the standard under Section 504 for over a decade, but the requirements of job-relatedness and business necessity have been accepted standards under Title VII since 1971, when the U.S. Supreme Court decided Griggs v. Duke Power Co. 401 U.S. 424. The Analysis to the lead agency 504 regulations in 1977 stated that the job-related requirement "is an application of the principles established under Title VII of the Civil Rights Act of 1964..." 42 Fed Reg 22688. As an illustration of the unfairness of this requirement to businesses, the ASPA gives the following example: "And actual physical employment criteria such as lifting requirements, strength and agility tests would be subjected to individual review in which the selection criteria would have to be shown to be necessary for the essential function of the job, a standard which probably cannot be met." p 7.

This individual review is exactly what is required under Section 504 (and Sections 501 and 503) in order to ensure that persons with disabilities are not excluded from employment opportunities for which they are qualified because of "lifting requirements, strength and agility tests" that bear no relationship to the successful performance of the job.

My written testimony documents the historic and current exclusion of millions of qualified Americans with disabilities exactly because employers disqualify them based on out-moded physical criteria. Is ASPA suggesting that a person with a disability who is qualified to perform the essential functions of the job of contract analyst be disqualified because he can't lift 50 pounds? Lest this be considered an unrealistic worst case scenario, note that this is exactly what Bell Helicopter did before Section 503. See testimony of Arlene Mayerson, p 35. Bell Helicopter was certainly not alone in this practice.

ASPA seems to object to the application of a job-related business necessity requirement to an individual. However, this too has been the standard under Section 504. 45 CFR §84.13 bars any "employment test or other selection criterion that screens out handicapped persons or any class of handicapped persons" (emphasis added) unless job-related and no less discriminatory alternative exists.

6). Alcoholics and Drug Abusers

ASPA objects to the language of Section 101(b)(2), which provides that an employer can disqualify a person whose current use of alcohol or drugs poses a direct threat to property or the safety of others. This is the same provision that was included in the 1978 Amendments to Section 504.

Moreover, the ADA is consistent with the recently passed Drug-Free Workplace Law. The ADA does not grant any protection for the use of drugs in the workplace. Such use can be prohibited and employees can continue to be fired, without any recourse under the ADA, for violating such prohibitions.

This interpretation has been long-standing. In the analysis to the original lead agency regulations, 42 Fed Reg 22686, HEW stated:

> With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider--for all applicants including drug addicts and alcoholics--past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

B). Remedies

Under the guise of not wanting disabled Americans to be "dependent upon resolution of disputes by overcrowded courts...", ASPA seems to suggest that disputes be resolved "in an administrative and not judicial setting." p 8. As has long been recognized in any civil rights context, a private right of action in court is essential to promote enforcement. Moreover, the incorporation in the ADA of Title VII procedures provides the same administrative mechanism required in cases involving race and sex.

Finally, ASPA seems to object to the inclusion of Section 1981 remedies because "case by case resolution before a jury required by the 1981 option makes no sense...". Why does this make no sense for Americans with disabilities, when it is available to minorities? The cases in which 1981 damages are available in the employment context involve intentional discrimination for compensatory damages and wanton conduct or careless disregard of rights for punitive damages. The types of cases brought under Section 1981 demonstrate that it would "make no sense" to fail to have these remedies available. In cases of extreme harassment on the job, Title VII would provide no monetary award to the injured party. Cases have involved black police officers having rats put in their lockers, or poison in their lunch boxes. Without the availability of compensatory and punitive damages, this type of racist assault would go undeterred, and its victims uncompensated. Unfortunately, this type of aggression also occurs against persons with disabilities. One need only remember that the Ray boys' family's home was burned down when they sought to enforce their rights to go to school after a diagnosis of AIDS. Attacks on co-workers with AIDS have also been reported. Moreover, the age-old practice of taunting people with a wide variety of disabilities has not ceased. Remedies must be available to ensure that employers prohibit such practices.

II). REBUTTAL TO THE CHAMBER OF COMMERCE TESTIMONY

The testimony of the Chamber of Commerce essentially raises five points. Each will be addressed in turn.

First, the Chamber objects to the structure of the Act, which contains general prohibitions of discrimination in Title I, and specific employment prohibitions in Title II. This format is taken from the Section 504 regulations, as is the content of the general prohibitions. Any concern about conflicting obligations is resolved in Section 601(c) entitled Relationship Among Titles, which provides that "...any apparent conflict between provisions of the Act shall be resolved by reference to the title that specifically covers the type of action in question". While the Chamber is concerned that "the vague language" of Title I "is an invitation to litigation" and therefore urges specific language, it next objects to the inclusion of a definition of "reasonable accommodation" and urges that it "not be defined in the proposed bill, but rather left to the courts."

On one hand, the problem with the general language in Title I is that it invites litigation, and on the other hand, the problem with providing a definition of reasonable accommodation is that it should be left to the courts to define.

The Chamber then takes off on the basic misunderstanding that the ADA's reasonable accommodation requirement requires "all private employers to provide readers and interpreters, and to engage in wholesale modification of the workplace" p 4, and concludes from this inaccurate premise that the ADA "threatens to make American business even less competitive in our increasingly global economy" Id. The Chamber seems to have disregarded Title II, which explicitly limits the employer's duty to make an accommodation if it would pose an undue hardship. As has been the case since the original 504 regulations, the determination of undue hardship takes into account the size of the employer and the nature and cost of the accommodation. The Chamber's hysteria about the world economy is clearly misplaced.

The Chamber also expresses concern about the provision of the ADA regarding alcohol and drug abusers, and urges the Section 504 language. The ADA language is modelled after that contained in the 1978 amendments to Section 504, and achieves the same effect. There is not a "significant limitation upon employers ability to protect their employees..." p 5, as the Chamber suggests. As stated earlier in response to the ASPA concerns, the ADA incorporates the safety concerns of Section 504, and is totally consistent with the Drug-Free Workplace Law.

The Chamber's concerns about the "essential functions" of the job language has been addressed earlier, as has the concern about inclusion of 1981 remedies.

The drafters of the ADA must be applauded for the reasoned approach to a serious national problem - discrimination against 43 million disabled Americans. The Chamber and the ASPA state that they agree with the goals of the bill. A review of the technical problems raised at the hearings reveals that they were based upon misunderstandings of the ADA, or on misinterpretations of existing law.

We urge swift passage of this landmark piece of legislation.

Sincerely,
Arlene Mayerson
Arlene Mayerson
Directing Attorney

DREDF Disability Rights Education and Defense Fund, Inc.

Law, Public Policy, Training and Technical Assistance

June 27, 1989

The Honorable Tom Harkin
Chairman, Subcommittee
  on the Handicapped
United States Senate
Washington, D.C. 20510-6300

Dear Senator Harkin:

Thank you for forwarding Senator Hatch's questions on the ADA employment provisions to me. The answers to these questions which follow reaffirm the basis of my testimony that the ADA employment provisions incorporate Section 504 standards and are necessary to ensure equal employment opportunity to Americans with disabilities.

Question No. 1:

In the substantive standards in the employment section, the bill says the term "discrimination" includes the failure to make reasonable accommodations unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business."

Is the EEOC's definition of undue hardship (29 CFR Section 1613.704(c)) your understanding of what "undue hardship" is?

Answer to Question No. 1:

The definition of "undue hardship" contained in the EEOC regulations, 29 CFR Section 1613.704(c), is intended to be the standard under the ADA. This definition is identical to the one contained in the Section 504 regulations, 45 CFR 84.12(c). The undue hardship concept provides a flexible approach which gives due consideration to the burden on the employer of providing the accommodation.

The Chamber of Commerce urges that the "undue hardship" standard in Title VII for religious discrimination be adopted. The "de minimus" standard adopted in Trans World Airlines v. Hardison is not the standard under Section 504 and should not be the standard under the ADA. Various courts have pointed out that there is a significant difference between Title VII and Section 504 with regard to the term "undue hardship," e.g., Prewitt v. U.S. Postal Service, 662 F2d 292, 308 n. 22 (5th Cir. 1981).

The Chamber and the ASPA seemed to agree at the hearing that a de minimus standard was inappropriate in the context of

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providing accommodations to persons with disabilities. Now, the Chamber appears to be backtracking. Although it is true that many or even most accommodations will be inexpensive, others will be more costly. The current undue burden standard which takes into account the size of the employer, the type of operation, and the nature and cost of accommodation is sufficient to alleviate the concern of the Chamber that the "mandatory hiring of readers and interpreters are not required as a matter of course by all private employers." Under the undue hardship standard, employers are not required to make accommodations which are "well beyond the means of many, if not most employers," the concern expressed by the Chamber.

Question No. 2:

The bill includes as discrimination the use of "qualification standards, tests, selection criteria or eligibility criteria that identify or limit, or tend to identify or limit, a qualified individual with a disability . . ., unless such standards, tests, or criteria are shown by [the covered] entity to be necessary and substantially related to the ability of an individual to perform the essential functions" of the job. Section 202(b)(3).

(a) This language could be very onerous. Few employers may be able to show that this or that job related criterion is absolutely necessary. Could you comment on this?

(b) Do you have objections to the use of alternative language, currently found in EEOC regulations, which provides, with respect to criteria that disproportionately screen out persons with disabilities, (1) that criteria and tests be job-related to the position in question and (2) that alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not available? [29 CFR Section 613.705(a)]

Answer to Question No. 2:

The concept of business necessity is well established in anti-discrimination law. This concept, as well as that of "job-relatedness" is taken from Title VII jurisprudence. The relationship between job-relatedness and business necessity is explained in Albemarle Paper Co. v. Moody (1975), where the Supreme Court stated that plaintiff has the opportunity "to rebut the defendant's evidence by showing that although the test is job-related, it does not constitute a business necessity in that an alternative selection device exists which has comparable business utility but would have a lesser adverse impact."

It is this formulation of business necessity which is incorporated in the EEOC regulation cited in part (b) of the question posed by Senator Hatch. In addition, the Section 504 lead-agency regulations adopt the same formulation, 45 CFR Section 84.13(a). The ADA incorporates this formulation of job-relatedness and business necessity.

Question No. 3:

The employment section's effective date is the date of enactment. Many employers are going to be confused about their responsibilities and many will need time to understand them, as well as to prepare to make the necessary accommodations for persons with disabilities. Title VII of the 1964 Civil Rights Act, banning employment discrimination based on race, color, national origin, religion, and gender was effective one year after date of enactment. Is there any reason not to have the same one year effective date we had in the parallel civil rights statute?

Answer to Question No. 3:

The current enforcement provisions are appropriate.

Question No. 4:

Is the bill's definition of "reasonable accommodations" at Section 3(3) consistent with current Section 504 regulations? For example, under Section 504, if a person with a disability is no longer able to perform the job he or she is in, must the employer reassign the person a job he or she can do?

Does the employer under the bill have to bump an incumbent employee or create a new job to effectuate the reassignment?

Answer to Question No. 4:

The definition of reasonable accommodation is consistent with the current Section 504 regulations. As to the specific example, reassignment is one possible reasonable accommodation. As with any other accommodation, the factors of undue hardship would be taken into account. Bumping an incumbent or creating a new job would not be considered reasonable under existing standards.

Question No. 5:

Do you have an estimate of the net dollars we can save by opening up employment opportunities on a fair basis to persons with disabilities and thereby reducing dependency?

Answer to Question No. 5:

The President's Committee on Employment of the Handicapped (now referred to as Persons with Disabilities) published a report on the employment status of persons with disabilities entitled, "Out of the Job Market: A National Crisis." In that report the Committee stated:

> The cost to our nation of tens of millions of disabled persons out of the labor force is staggering. In 1985, the Federal Government spent $62 billion on subsidies, medical care, and other programs for disabled persons, of which more than 93% was to support out-of-work individuals with disabilities.
>
> * * *
>
> There is a popular myth that disabled people prefer to receive benefits rather than work . . . . Sixty-six percent of all disabled adults of working age (16 - 64 years old) who do not now work say they want to work. . . . Five million disabled Americans are on Social Security, Disability Insurance or Supplemental Security Income rolls--but many would rather leave those rolls and go to work.

I hope these answers are helpful. We look forward to the passage of the ADA.

Sincerely yours,

Arlene B. Mayerson
TD

Arlene B. Mayerson
Directing Attorney

ABM:td

INVITED TESTIMONY ON THE "AMERICANS WITH DISABILITIES ACT"

FRANK G. BOWE, Ph.D., LL.D.

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Good morning. It is a pleasure to be here to testify about the "Americans with Disabilities Act of 1989".

The Chairman has stated that this bill is "the most critical legislation affecting individuals with disabilities ever considered by the Congress", and he is correct.

It is important because it explicitly establishes rights implied in our Constitution and Bill of Rights but never implemented or protected in our 200-plus years as a nation. Enacted and enforced, the Americans with Disabilities Act would help us to fulfill our mission as a nation: to treat all men and women equally under law.

It is important because -- with the rights and services established under this bill -- we may at last move to help millions of people with disabilities to live a life worth living -- a life of independence, gainful employment, and full integration into society.

It is important because it does all this in a fair and equitable way. The bill provides protection to a long-neglected population but does so without infringing on the rights of others in America. It establishes no goals, no timetables, no quotas: it will not diminish in any way the rights and opportunities available to other minority groups in our nation.

And it is important because it is one of the key tools we need to reduce federal and state spending. Today, the Federal Government alone spends in excess of $60-billion, or one-third of the budget deficit total, maintaining some six million Americans with disabilities. This bill, together with the Education of the Handicapped Act being reauthorized this year, the Rehabilitation Act reauthorized three years ago, the Fair Housing Act Amendments enacted last year, the access to air transportation legislation recently enacted, and other federal laws, helps to complete a tapestry I have long wanted to create: the foundation upon which people with disabilities may prepare for, compete fairly for, get, perform, and live off productive and gainful employment as fully contributing members of society.

The importance of this bill is hard to over-state. It extends nondiscrimination rights in employment for people with disabilities to several millions of employers where we currently enjoy no federally guaranteed rights. It requires access to, and equal services in, millions of places of public accommodation, where once again we have no federally guaranteed rights at present. And it corrects one of the great injustices of this century -- the denial to people who are deaf of equal access to the telecommunications network of which this nation is so proud.

In Title I, the Congress wisely has chosen a definition for the term "disability" that is clear and well-understood. You have adopted the definition of the section 504 term "handicap". We have more than a decade of case history behind that definition. Title I also explains that the intent is for "equal" treatment -- not preferential treatment, not substandard treatment. And Title I lays out the "effect" standard that will be followed: actions which have the effect of discriminating on the basis of handicap are outlawed.

These are crucial provisions. It matters little to me, or to any other person with a disability, exactly why some person or entity denies me, him or her equality of opportunity. It is the effect that is so destructive. I have been told, for example, that "We don't hire deaf people." To learn that, and to have no answer to it, after two decades of preparing myself for gainful employment, is just devastating. Why did I try? Why should others younger than I even bother, if that is what will happen at the end?

Title II does something this nation long ago should have done. If we believe, as I think we do, that vulnerable individuals and groups should have protection, we should offer to them a single, fair standard of protection. To do otherwise is actually to legalize discrimination of one kind while outlawing another. Since the Civil Rights Act of 1964, some protected groups have enjoyed a much higher, much better-enforced, much more meaningful level of protection than have others. As of today, only some 10% of employers in this nation must, by federal law, afford people with disabilities nondiscriminatory treatment in employment. This bill corrects that inequity.

In Title II, we find well-known, widely understood standards in employment. Such terms as "reasonable accommodation", "undue hardship", and "nondiscrimination" are well-established, with thousands of case histories behind them. In Title II, also, we find a clearly set-forth private right of action. Such a right does not exist under most interpretations of section 503 of the Rehabilitation Act of 1973, as amended; section 503 is, of course, the only federal statute governing employment of people with disabilities in private business. Again, the Congress has acted wisely by selecting remedies and procedures that are familiar to all of us -- those of Title VII of the Civil Rights Act of 1964.

In Title III, we find extremely important provisions governing access to ground transportation. Ten years ago, when I headed the American Coalition of Citizens with Disabilities (ACCD), I gave over a great deal of my time and attention to the issue of access to transportation, ultimately failing in my mission. We have not made public transit in this country accessible. Without the Americans with Disabilities Act, it will not become accessible, certainly not in my lifetime. Title III also does something that makes a lot of sense. It explicitly calls upon state government to follow the same rules as do federal agencies. Again, the Congress is moving wisely to make things more fair, more understandable, and, yes, more simple: that is what a uniform standard does. With a single set of rules to follow, government on all levels can understand, apply, and enforce them.

Title IV is crucial to a meaningful quality of life. As someone who travels frequently, I resent having to put my life at risk every time I stay in a hotel or motel. I am literally trapped in the event of a fire or other emergency, because no one has any way of alerting me to the danger short of coming into the room itself. I resent watching other hotel guests receive courtesy rides from airports when I must pay for a cab, simply because the only way to get the courtesy van to come is to make a voice telephone call.

In Title V, we find language correcting a century-old injustice.

Alexander Graham Bell had a deaf mother and a deaf wife; he was trying to help them when he invented the telephone. Ironically, no other invention ever has done more to hurt deaf people. Relays are important. I have had to drive thousands of miles more every year than my neighbors, because it is only by visiting a store that I can find out what products it carries, at what prices; they just call around town, pick what they want, and make one short trip. I remember one time when my wife and children were hours late getting home from a car trip. My neighbors in that situation would have called the local and state police, area hospitals, looking for any report of an accident. I had to drive 30 miles to the nearest state police building. It turned out they had been delayed by a traffic snarl.

It is important to me that the Congress understand that what we have now in California, New York and a few other States -- a TDD-to-voice and voice-to-TDD relay -- is not something that provides equal access to telecommunications for deaf people as compared to the level of service enjoyed by hearing people. The relays required under section 502 (a) and (b) of the bill would, as all relays do, limit me to short conversations, impose upon me an invasion of privacy by having someone else listen in on both ends of my conversations, and limit my ability to make connections on the first try far more than is true for hearing people. Such relays are certainly better than nothing. But the language in section 502 (c) offers opportunities that should not be neglected or ignored. We have now, and are researching more, exciting systems which would offer to me and others like me direct, unlimited, and truly private telecommunication services. I should add here that these potentially not only are higher-level services but they also may well be much less expensive than are relays. The bill should encourage, in all possible ways, the application by the scientific and technical communities and by telecommunications companies of innovative techniques and technologies; it should not allow a technology that has been around since the mid-1970s to become the de facto standard when others in America are benefiting from devices and services taking full advantage of state-of-the-art knowledge in the 1990s and beyond.

The provisions in Title VI complete what is a powerful and well-rounded piece of legislation. Rights, Stuart Scheingold once wrote, "are declared as absolutes but ripple out into the world in an exceedingly contingent fashion". To become real, they must be enforceable. To become understandable, they must be interpreted in regulations. To be enforced, counsel must be accessible and affordable.

Mr. Chairman, it has been a distinct pleasure and privilege for me to offer this testimony. I will be delighted to respond to any questions you may have.

Thank you.

Prepared Statement of Perry Tillman, III

Chairman Harkin, and members of the Subcommittee, my name is Perry Tillman, III. I am a National Vice President of the Paralyzed Veterans of America. I speak to you today not only as an officer of PVA, but as a disabled veteran who has experienced the types of discrimination which the "Americans with Disabilities Act" seeks to eliminate. I believe that with the enactment of this legislation you will help me and other disabled veterans enjoy the freedoms that we sacrificed so much for. Perhaps together we can end the second class treatment of all disabled people.

I am a Systems Accountant for the United States Department of Agriculture (USDA), Office of Finance and Management at the National Finance Center located in New Orleans, Louisiana. I have worked for the USDA since my education at Xavier University in New Orleans where I graduated after returning home from Vietnam. I have been the recipient of numerous government and public service awards and I am very active in many civic activities.

In 1976, after years of frustration of not being able to go to places that other citizens could go to because of discrimination on the basis of my handicap and because of the numerous barriers which existed in Louisiana, I was instrumental in the formation of the Bayou Chapter of PVA in New Orleans. My association with PVA dates back to 1966, after I lost the use of my legs from a helicopter crash in Vietnam.

PVA has been a very strong advocate for obtaining full civil rights and opportunities for individuals with physical disabilities for more than 40 years. As our name implies, all of PVA's 14,000 members are veterans and have incurred some form of dysfunction of their spinal cords, caused either by injury or disease. Regardless of the cause, the end result has been that by virtue of their disability and because of society's attitudes toward persons with disabilities, many PVA members like myself still face barriers which limit our full and equal participation in everyday American life.

Because most of our members rely upon wheelchairs and other aids for their personal mobility, PVA has been and probably remains the most active and effective proponent of the need for a more accessible America. We do so because we know first-hand what it is like to be denied access to theaters, restaurants, buses, and places of business and employment simply because a doorway is too narrow or an entrance has steps.

We also know about the many psychological barriers that exist -- the unfounded fears and assumptions that non-disabled people have regarding a person with a disability. We know first hand the real pain and heartache of discrimination, both intentional and by benign neglect. A day does not go by for me and other people with disabilities, that some form of subtle discrimination occurs that reminds us that we are different and are, therefore, faced with artificial barriers which do not permit our participation in American society as equal members.

Mr. Chairman, I was born and raised in the gracious city of New Orleans, Louisiana. As a child I suffered from an asthma condition. That didn't matter to my grandmother though, because she made me go to school anyway. She was a hard lady but she taught me many things. She taught me to be strong and not to let things get the best of me, no matter how big or how small. And so I kept trying even when my asthma acted up and left me short of breath. I did everything I could with the help of my grandmother's pushing to overcome my restrictions from asthma.

I can remember that as a teenager in high school no matter what the coach told me to do, I did it. I was a first string halfback on the football team my senior year. I also ran the high hurdles. Many times I tried to get that extra yard when I carried the ball. But sometimes I couldn't. You see, I was still suffering with that asthma condition.

After high school graduation, I traveled to California to live with my father and attend a junior college. My mother and grandmother were upset that I wanted to go so far away. But it was something I just had to do. In June of 1965, I was inducted into the U.S. Army. I went because my country called and it was my duty as an American citizen.

After advanced basic training, I decided I wanted to be a paratrooper. I could see myself proudly coming home with those airborne wings on my army uniform to the housing development where I lived. My grandmother would be proud, I thought.

I will never forget the champagne flight we took from Travis Air Force Base in California to South Vietnam. At the time it all seemed like just another training exercise to me. It was difficult to realize that some of us on that flight would never return to our homes and loved ones. I was lucky, Mr. Chairman, I lived. Like so many other young men in my company I thought it would take us maybe six months to end the war and then we would be back home.

Well, I returned home alright. It wasn't after six months. It was only three months later because, during a combat mission, I was severely injured in a helicopter crash. One of my buddies was killed in the crash and another had both of his legs amputated when the propeller blade sheared off. Four days after the crash I regained consciousness. The first thing I remembered was the agonizing pain as I was being rotated on a striker frame -- a sandwich like device used to turn a paralyzed person lying on their stomach to their back and vice versa. It was a horrible experience for a young man.

After my injury was stabilized, I was flown back to the states where I was sent to the Veterans Administration Spinal Cord Injury Center in Memphis, Tennessee. After spending eight months in the hospital and after going through long hours of rehabilitation to learn how to use a wheelchair and take care of my personal needs, I was finally ready to go home. I soon found that home was not ready for me and my wheelchair.

The pain and suffering I went through for my country, I would go through again. As a service connected disabled veteran, I knew my country would do everything it could to make my life whole again. The Veteran's Administration did its best to restore my health and rehabilitate me. They tried to prepare me for my new life in a wheelchair and they provided me with medical benefits and benefits that allowed me to go to college.

I went to Vietnam like a lot of other young men to fight for our country's ideals -- freedom and the ability to become whatever we dreamed of becoming. I did my job but the government let me down. You see when I came home I found out that what I fought for applied to everyone but me and other handicapped people. My dreams had to be put on hold while I continued to fight for these ideals myself from my wheelchair.

In 1966 when I came home from Vietnam, America was not accessible. In many areas of the country it still isn't. I couldn't even use the bathroom in this building today because it is not accessible. I couldn't ride the bus here today because not every bus has a wheelchair lift on it. Although my grandmother taught me to be strong and not to let things get the best of me, I can't wish my way onto a bus and I can't make my wheelchair smaller to fit into inaccessible lavatories.

I didn't return home from Vietnam walking. I never got that chance to show off my airborne wings. Instead, I came home in a wheelchair. The housing development where I lived was not accessible. In order for me to get in or out of my home, I had to be carried up four steps. My mother had a terrible time with this. Imagine a 5'2" woman weighing 110 pounds lifting 220 pounds, which was the combined weight of me and my wheelchair.

My fight for improved accessibility started in 1966 with a six inch curb and those four steps into my home. Those little obstacles made it impossible for me to leave my home unassisted. This was my first encounter with inaccessibility but it would not be my last.

When I came back from Vietnam I could not participate in society as I had been able to before. I couldn't go out to a restaurant without first calling in advance to see if they were accessible. I, along with many others in wheelchairs, have seen the kitchens of many restaurants. The statement is always that "our main entrance isn't accessible but our service entrance is". I'll bet I have heard that statement a million times. I have had to pass up going to many places because I couldn't even get into their service entrance. There have been many other times when people looked at me as if I should stay at home because I was in a wheelchair.

I never thought that this would happen to me when I was flying combat missions in Vietnam. I thought people would welcome me as a veteran, not shut me out. The idea that disabled veterans and others with disabilities are sickly and should stay at home are myths. Fear is the main barrier society has toward disabled people. Society is afraid of anything that is different.

In the early 1970's a group of my disabled friends and myself formed an organization called "PLACE", which stands for Physically Limited Association for a Constructive Environment. We saw the need for a clearinghouse type of organization to speak for persons with disabilities. We had one goal and that was to improve the lives of those disabled individuals living in the state of Louisiana.

PLACE had to fight to get the Louisiana legislature to act on many important issues concerning our members. Our most important victory was getting a handicapped license plate bill passed. With the help of other disability organizations we were victorious.

Another aspect of my involvement toward helping make society more accessible is the fact that I have been a member of the New Orleans Mayor's Committee on Disabled Concerns since 1980. I was a part of the city's street directive, which mandated that when a street is repaired, curb cuts would be put in at the renovated intersections. The 1984 World's Fair provided added impetus to this improved accessibility and in my capacity as President of the Bayou Chapter of PVA and the Mayor's Committee, I was privileged to have played a part in that historic event also.

In addition, I have been an active member of the Regional Transit Authority's (RTA) Elderly and Handicapped Advisory Committee since 1982. The RTA's Committee was created after the Rehabilitation Act Amendments of 1978 and we have continually debated the pros and cons of an accessible fixed route bus system against a separate dial-a-ride system. I personally believe in an accessible fixed route bus system because separate but equal has never been equal.

I visited the Seattle, Washington transit system which has been a model of transit accessibility. I brought back to the RTA all the information of the Seattle success story. The RTA though didn't listen to our wishes and has implemented a dial-a-ride system instead. With this system I have to make my trip plans 24 hours in advance and can't travel with my friends who come in from out of town because you have to be a resident of New Orleans to use our Regional Transit Authority's paratransit service.

The recent court ruling in Philadelphia requiring that wheelchair lifts be put on all new buses is still being debated. I applaud the U.S. Court of Appeals for their ruling in this matter. Those of us in wheelchairs have been denied access to this nation's mass transit system for too long. The Department of Transportation's current "local option policy" leaves too many gaps in our overall public transportation system.

Sometimes the adversities which I, and so many other veterans and other people with disabilities, encounter are a bit much to bear. I thank God that my grandmother pushed me the way she did. I can't tell you the effect she had on me, not only when I was young but even more so when I became injured in Vietnam. She taught me to roll with the punches. And that I have done and continue to do.

But not everyone has a grandmother like mine to help them through the tough times. And not everyone has my mother to help them up the stairs into their home or into a restaurant. Nor should they have to depend on someone to help them over these barriers. Barriers should not be built to keep us out any longer.

I did my job when I was called on by my country. Now it is your job and the job of everyone in Congress to make sure that when I lost the use of my legs I didn't lose my ability to achieve my dreams. Myself and other veterans before me fought for freedom for all Americans. But when I came home, and I found out that what I fought for applied to everyone but me and other handicapped people I couldn't stop fighting. I have fought since my injury in Vietnam to regain my rightful place in society. I ask that you now join me in ending this fight and give quick and favorable consideration to the "Americans with Disabilities Act" in order to allow all Americans, disabled or not to take part equally in American life.

Thank you Mr. Chairman, that concludes my testimony. I will be happy to answer any questions that I can.

Joint Prepared Statement of Vickie Franke and Lisa Carl

When Lisa got home, I asked her why she was not at the movie. She told me what she just told you. I called the woman who owned the theater up to ask her why she had excluded Lisa from the theater. She replied, "Because I don't want her in here."

I was very upset when I heard this. I asked her again, "Why?"

"Because I can't understand what she wants."

I said, " You have only one movie showing, the admission is only one dollar--so, one should be able to surmise, when handed a dollar from someone in line, that they probably want to watch the movie."

She replied, " She can't even open the goddamned door."

"That's not entirely true, I said, " It may take her some time, but she can do it. And, many people are willing to open the door for her."

She said, "They shouldn't have to open the door."

I then asked her, "Is there a reason, has there been an incident that we can talk about--or resolve?"

Her reply was, "I don't want her in here, and I don't have to let her in!!!"

I said, "It feels like you're discriminating against her based on her disability."

She said, "I don't give a good goddamn what it sounds like." And she hung up on me.

Joint Prepared Statement of
Vickie Franke and Lisa Carl

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On May, 23, 1988 I decided to go to a movie.

The movie was "Three Men and a Baby".

The movie theater was around the corner from my house.

I waited in line and when my turn came I tried to pay my dollar.

But the owner of the theater would not take my dollar.

She said I could not go in.

I asked her, "WHY?"

She said, "You just can't."

"Why?" I asked her again.

She said, "Do you hear me?"

"Yes, I hear you", I said. "I just want to know why".

She would not say, she said, "Would you move out of the way"?

I left. I felt embarrassed. I went home. I was not crying outside but I was crying inside.

I just wanted to be able to watch the movie like everyone else.

My name is Lisa Carl. I am including this written statement with the one I am orally presenting to you because my speech is made slow by C.P. and I only have a short time to speak, but I have a lot of things that I want you to know. I would like you to know a little bit about me.

I am 20 years old. My birthday was last Friday.

I am intelligent, interesting, active and happy,. My friends tell me that I am pretty, since they are my friends, I can't say they are lying. I'd like to tell you about what I can do. I can ride horses, go to school, hang out at the beach, go shopping, take a bus, feed and dress myself, carry on an intelligent conversation and I like to go to the movies.,

The reason I can do so many things is because when I was growing up my mother told me every day, "Lisa, you can do anything that you want". I believed her then and I believe her now. What I can do is a longer list than what I can't do. What I can't do is: anything that requires a lot of physical coordination. For example, I am not qualified to be a professional basketball player. That is because I have cerebral palsy. The only thing that is "wrong" with me is that I have physical limitations on what I can do.

I have all the same hopes, dreams and wishes of any young woman: to lead a productive life, get married, have children, be respected in my community and to shop until I drop.

Now you have heard and read about my story. When I tried to go to the Bijou Theater in Tacoma, Washington - I tried to pay a dollar and get in but the owner would not let me. She would not let me come in because of what I am. A person with Cerebral Palsy. I was sad for me - but more sad for her because she could not see ME, only my C.P.

Then I got home (on my own) and told my Mom what happened (on my own). My mom called the theater owner. She would not talk to my mom either, except to say that she did not want me in her theater, and she did not have to let me in.

Later, a lot of people got together with me and my Mom and we picketed the theater to let everyone know what an unfair person this woman was. Now, let me tell you the really said thing. All I wanted to do was - go see a movie. Not get special treatment. Just be like everyone else, because inside I am like everyone else, if only people would care enough to take the time to look.

I hope my story helps to educate people about the tragedy of prejudice. I ask you to use the means within your power to pass the Americans with Disabilities Act so we can fight discrimination. I look forward to the day when we all look past things like physical limitations, handicaps, mental limitations and skin color and see each other as God would have us - with respect, concern and love.

Testimony of Ronald L. Mace FAIA on the Architectural Accessibility Aspects of the Americans with Disabilities Act 5-10-89

I am Ronald L. Mace, an architect and president of Barrier Free Environments, Inc. in Raleigh, North Carolina. We are specialists in design for disabled and older people and we have been active in this area on a full time basis for over fifteen years. Our work includes designing buildings and products to be universally usable by everyone regardless of their level of ability or disability. We also conduct design research and do training programs and publications to teach other designers the best methods for making all products and buildings universally usable to the greatest extent possible. Our clients include businesses, major corporations, individuals, families, government agencies,and private organizations of all types. We are known throughout the U.S. for our work and we have extensive experience in creating usable, marketable facilities at little or no additional cost.

My remarks in support of the Americans with Disabilities Act (ADA) focus on the environmental design aspects of the non-discrimination provisions. The ADA requires all new facilities and all additions and substantial modifications to be accessible within a specified period after the ADA is passed. It also calls for certain features in existing facilities to be modified if the changes can be readily accomplished.

In new construction, major remodeling and additions, there is no reason why universal accessibility cannot become common practice. Experience has shown that with few exceptions, and when implemented with appropriate information and care, access costs little or nothing and benefits everyone. Accessible buildings are safer and easier for everyone to use. They eliminate discrimination against disabled people and do not negatively effect the aesthetics of new and renovated facilities. There are choices and options available for any building designer at the concept stage of their planning that can almost entirely eliminate additional expense and the need for special accessibility features. For example, in new construction and additions, at least one floor can be placed at ground level or at an existing floor level to eliminate the need for ramps that are expensive and potentially "awkward-looking".

Accessibility does not add features to buildings it merely requires that features commonly provided have certain characteristics that are useable by all people. Items may need to be mounted at a particular height; such as light switches, receptacles, and thermostats. Some may need to be a particular shape or provide visible contrast; such as lever handles rather than round door knobs, and lighted as well as audible signals and alarms. Some may need to be larger, such as wider doors. These are all no cost or low cost items because they cost no more than their non-accessible counterpart. Often costs are traded off, as in the case of wide doors where the inclusion of a wider door reduces the required amount of the more costly wall segment.

Accessibility adds little or no space to buildings. An accessible path is only 36" wide. Rarely if ever are corridors or passageways allowed to be less than 36" wide because of fire or emergency egress.

There are two items that one might consider as "added" to produce accessible buildings. These items may not be included in buildings if not required for accessibility purposes. One item is grab bars at some toilets and tubs which provide assistance for persons while transferring to the toilet. The second item is elevators. Elevators are not required by building codes and can only be considered an extra cost if they are installed exclusively for the purpose of providing accessibility and this is rarely the case. Elevators are a convenience that make multi-story buildings practical and marketable. The cost for making a general use elevator useable by all people is minimal and the cost factor is further reduced in taller buildings where an elevator provides access to multiple floor levels.

Accessibility costs are often cited as percentages of the total project's construction cost or as cost per square foot. Such figures are nonsense. There are simply too many variables in building design and site complexity to reduce this issue to a simple figure for all facilities. In new construction, including most additions, the cost that can be legitimately attributed to access is not measurable in all but the smallest of projects or those with extreme site conditions. In additions requiring some renovation of the original structure, some costs may develop, however here again the variables are numerous and quite individual from project to project and they defy an across the board percentage figure.

Some areas and some features or elements in certain types of facilities or sites may be difficult to make accessible to people with some types of disability. For example, it may be impractical to provide access for wheelchair users to catwalks and ladders in heavy industrial facilities such as refineries, chemical and water treatment plants; or to some natural elements such as mountain peaks or caverns that are open to visitors; or to above ground floors of very small multi-story buildings. While concessions may be in order for access to wheelchair users, these same areas can and should remain accessible for people with other disabling conditions including, ambulatory mobility impaired people and those having visual , hearing, or cognitive impairments. Because of these variables, it may be necessary to promulgate a flexible guideline that will take into account a small number of such known difficult issues.

Accessibility, as prescribed by the ADA, will not increase building costs, but will incur costs through the time commitment required for training, experience development, and attitude adjustment of design professionals. Designers and builders are still not taught to design for other than able-bodied adults. Most know only what they read in the building codes and laws which mandate a few special minimal features for access. The codes and laws are a poor educational mechanism and they generally reinforce negative attitudes by prescribing bare bones minimal accessibility in selected building types.

Modifications to improve access to existing buildings are extremely variable in cost and complexity. Renovations are unique for each building type which makes costs difficult to estimate. Much experience with building modifications for accessibility has been gained in recent years as modifications have been made in order to meet the program access requirements of Section 504 of the Rehabilitation Act of 1973. Innovation and new technology have made modifications less expensive and complicated and a range of manufactured products are available now that were unheard of only a few years ago. For example, listening systems for hearing impaired people in assembly areas can now be provided without hard wiring, by using infra-red or FM radio transmitters as part of the facility's public address system.

Access modifications to existing buildings prescribed in the ADA focus on those changes that can be "readily accomplished". This may include items that can be added, removed or relocated to increase accessibility at little or no expense. The following is a sample list of potential modifications that can be readily accomplished :

- install a permanent or portable ramp over an entrance step
- install offset hinges to widen a doorway
- reduce the pressure of a door closer or install a power door operator
- relocate a vending machine to clear an accessible path
- eliminate a turnstile or provide an accessible path around it
- replace worn carpet with low pile high fiber density carpeting
- install appropriate handrails at stairs
- create a designated handicapped parking space
- replace broken or worn hardware with accessible hardware
- install a grab bar at an existing toilet
- lower the paper towel dispenser in toilet room
- remove toilet partitions in single partition toilet rooms to increase maneuvering space
- remove lavatory aprons and insulate pipes to improve use by wheelchair users
- install a full length mirror in bathroom
- install a raised toilet seat
- select adjustable furnishings to accommodate a broader range of users
- arrange furniture to maintain accessible routes
- lease or purchase accessible easy-use equipment models from vendors rather than inaccessible models with the same features
- locate work supplies within universal reach heights
- mount power strips to bring electric outlets within easy reach
- make closet rods adjustable for use at multiple heights
- install paper cup dispenser at existing inaccessible water cooler
- locate a planter under a protruding object for easy detection by blind patrons
- use large high contrast type in facility signage
- install signage to indicate accessible routes and features within facilities
- install raised tactile labels on existing elevator panels
- install an adapted elevator control panel or a wand for access to high control buttons
- install an accessible remote switch to activate power operated items
- utilize a portable audio loop system or FM listening system for hearing impaired people
- install a Telecommunications Device for the Deaf (TDD) for use by deaf people

The architectural provisions of the ADA alone will vastly increase opportunities for disabled people by eliminating the subtle but pervasive discrimination that prohibits many disabled people from fully participating in society. Many years ago the racial civil rights non-discrimination act required the elimination of separate special facilities for racial minorities. Today the ADA will mandate the same considerations for America's 42 million disabled people.

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WILLIAM BENTLEY BALL

May 18, 1989

Hon. Tom Harkin
Chairman
Subcommittee on the Handicapped
Committee on Labor & Human Resources
United States Senate
Washington, D.C. 20510

Re: Americans With Disabilities Act
of 1989: Senate Bill 933

Dear Senator Harkin:

Let me thank you for your courtesy in having permitted me to testify at the May 10 hearing and, in particular, for your willingness to discuss, at the hearing, a number of the questions which I had raised.

Please again be assured that the Association of Christian Schools International (ACSI) deeply appreciates your interest in protecting people with disabilities. The very moving testimonies of witnesses at the May 10 hearing conveyed messages which are familiar to ACSI - messages which underscore the need to protect disabled people from injurious and demeaning discriminations.

Following our exchange, my client felt that I should be writing you in order to restate its very few, but critically important, reasons on behalf of amendment to the bill.

1. "Public Accommodations" - Private Schools.

Section 401(2)(B) would convert private schools into "public accommodations," even if they are not engaged in commerce and even though they receive no federal financial assistance. ACSI has two basic objections to this provision.

The first is an objection simply to the designation, apart from any questions of burdens such as cost, or of intrusive administrative entanglements with government. Designation of a non-tax-supported religious school as a place of "public accommodation" would effect a radical change in its legal nature. An ACSI school is

- founded solely to carry out a pervasively religious mission to children. It would not exist except for that purpose.
- staffed solely by teachers engaged (at sacrificial wages) to form children according to that mission.
- not open to the general public, either in its enrollment or its staff.
- not a recipient of federal - or state - funding.

Attempting to transform these schools by the device of labeling them "public accommodations" simply contradicts the reality that they are, by their very nature, not "public accommodations."

Second, this arbitrary transformation is an extremely threatening precedent. If these schools are not "private" accommodations, "private" has no meaning. If they are, by statutory device, made "public" for purposes of your Act, why not for purposes of any and all other federal regulatory acts? They either are, or are not, "public" accommodations. In fact, they do not accommodate the public. They accommodate solely those whose faith commitment seeks them out.

I have found no precedent in federal or state statutes for rendering religious schools "public accommodations."

Your own State of Iowa, in its Civil Rights Act of 1965 (Iowa Code Anno., §601A.2.10), is interesting in this regard. It defines "public accommodation" as "every place, establishment, or facility that caters or offers services, facilities, or goods" for a fee or charge to nonmembers of any organization or association utilizing the place, estabishment, or facility . . ." If the facility offers its services gratuitously to the nonmembers "it shall be deemed a public facility if the accommodation receives governmental support or subsidy." Then your statute goes on to say:

> "Public accommodation shall not mean any bona fide private club or other place . . . which by its nature is distinctly private [except where it offers its services to nonmembers]."

Last year your state Supreme Court held that the Jaycees, a secular, private organization, was not a "public accommodation." U.S. Jaycees v. Iowa Civil Rights Commission, 427 N.W.2d 450 (1988).

Alaska defines "public accommodation" as

> ". . . a place that caters or offers its services, goods or facilities to the general public . . ."

California's courts have expressly held that a private school is not a place of "public accommodation" within the meaning of its Civil Rights Act. Reed v. Hollywood Professional School, 338 P.2d 633 (1959). Involved in that case was a mere private professional school, not a religious school. Idaho's Human Rights statute provides, in part:

> "(3) This act does not apply to a private club, or other establishment not in fact open to the general public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the establishment are made available to the customers or patrons of another establishment that is a place of public accommodation."

Illinois' courts have held "place of public accmmodation" to mean places "where the public is invited to come and partake of whatever is being offered therein." People v. Murphy, 145 Ill. App. 813 (1986). Indiana's anti-discrimination statute defines "public accommodation" as "any establishment that caters or offers its services or facilities or goods to the general public." Ind. Stats. Anno. II §22-9-1-3.

I could go on with similar examples. Suffice it to say that religious schools should never be classified as your bill seeks to classify them.

In light of the foregoing, it is surprising to me that, in Title II ("Employment") of the ADA Bill, you exempt "a bona fide private membership club that is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986." All religious schools (and all churches) are likewise exempt from Section 501(c). I am puzzled that you would want to saddle those religious entities with the requirements of Title II while exempting secular private clubs. Conversely: if you believe (as evidently you do) that America's myriad private clubs should not be covered, how can it be that you do not exempt America's churches and religious schools?

2. Cost.

Apart, however, from those objections, are ACSI's objections relating to the practical impact of the ADA, as now drafted, upon its schools. You will recall that I said, at the hearing, that your bill's application to government facilities, to industries, and to governmentally funded entities is understandable. But most religious schools simply inherently lack the financial means to come under the bill's potential requirements. As all at the hearing seemed to agree, the ADA Bill is necessarily vague as to what those requirements, for a particular covered entity, may turn out to be. Hence, as you said, the application of the Act will be "case by case." Our schools, however, though of high quality, exist upon such narrow financial means that they can have no tolerances in their budgets for large extraordinary expenses. They absolutely have to plan, on a long-term basis, their operating existence. Their budgets are designed to enable them to do their basic job: educating children well in a safe environment. The ACSI school's budget, then, can only cover doing the basic job. It does not contain any contingency fund for potentially large expenses not presently measurable. Nor, as a matter of religious principle, can the ACSI school seek government subsidy for such expenses.

Your reference to compliance, by religious schools, with asbestos removal requirements seems not in point to me. It is true that, in some situations involving emergency health needs, schools may be forced to close their doors due to being unable to meet the cost of remedying the problem. That has happened, in the case of some schools, in the matter of asbestos. The ADA Bill does not address any such health or safety hazard.

3. Your Further Points.

At the hearing you graciously furnished me with your "Questions and Answers On The Americans With Disabilities Act of 1989." The following points deserve further comment:

AIDS. We did not misconceive your position on AIDS as requiring religious schools to hire people with AIDS. Our point instead was that the ADA Bill can be read to bar a religious school from setting a "qualification standard" which would be stricter and narrower than that allowed by Section 101(b)(2)(B). That section says that it is a defense to a charge of discrimination to show that the "qualification standard" requires only that "an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the workplace or program."

I wonder if you focused on churches - or, especially, on religious schools - when you drafted that provision. I cannot believe that you meant that a religious school would have no defense under your Act, against a charge of discrimination by an AIDS carrier where that person (a) has derived AIDS from immoral behavior (irrespective of any "direct threat to health"), (b) poses an indirect threat to the health of the children.

Similar considerations apply, as my testimony noted, to alcoholics, users of alcohol and drug users.

Title VII. You made reference to Title VII and wondered how we can object to the ADA Bill when already religious schools are bound by Title VII. Your Question 9 seems to go to this same point. This provision is obviously susceptible of very narrow interpretation. If a religious school were to tell an enforcement agency that the prospective cost of a building alteration meant closing the school's doors, would that position be interpreted as "based on religion?" The Title VII rationale simply does not fit here. Too readily, under ADA, the government enforcement agency will tend to respond: "Surely, you have no religious tenet which precludes your altering the building?"

Litigation. I was alarmed that you suggested, at the hearing, that undoubtedly some problems under the ADA Bill would have to be resolved by the courts. I do not mean to be presumptuous in urging that occasions for litigation involving religious institutions be eliminated before enactment. In my testimony I argued that some features of your bill pose very serious problems under the Religion Clauses of the First Amendment. The just cause of the disabled will not be advanced by trying to impose the precedent of this legislation upon religious schools.

4. Recommended Amendment.

We respectfully suggest that the bill be amended to provide that it is not applicable to religious schools.

In lieu of that we suggest that Section 201(3)(B) be amended as follows:

> (B) EXCEPTIONS. - The term "employer" does not include -
>
> (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
>
> (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986; OR
>
> (iii) CHURCHES AND RELIGIOUS SCHOOLS WHICH ARE EXEMPT FROM TAXATION UNDER SECTION 501(c)(3) OF THE INTERNAL REVENUE CODE OF 1986.

and

Amend Section 401(2)(A) to read:

> (A) IN GENERAL. - The term "public accommodation" means privately operated establishments, EXCEPT CHURCHES AND RELIGIOUS SCHOOLS WHICH ARE EXEMPT FROM TAXATION UNDER SECTION 501(c)(3) OF THE INTERNAL REVENUE CODE OF 1986 -

* * * * *

I incorporate by reference my written and oral testimony given on May 10. I shall be happy to come to see you to discuss any of this.

My thanks for your courtesy in reading this long letter.

Very truly yours,

William B. Ball

William B. Ball

WBB:dh

cc: Members, Senate Committee on
Labor and Human Resources

P.S.: I shall greatly appreciate your entering this letter in the record.

TESTIMONY OF
WILLIAM BENTLEY BALL
ON
"AMERICANS WITH DISABILITIES ACT OF 1989"
BEFORE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
SUBCOMMITTEE ON THE HANDICAPPED
MAY 10, 1989

Religious schools constitute the source of education for millions of American children. They make an enormous contribution to the well-being of our society. I testify today on behalf of a major organization of such schools, the Association of Christian Schools International (ACSI), embracing 2,471 Protestant evangelical elementary and secondary schools throughout the country, as well as a number of institutions of higher education and pre-schools.

There are some characteristics of ACSI schools of which you should be aware. For one, while they accept no public subsidy, they actually provide a major subsidy to the public. This subsidy is in two forms. One form is the savings they effect for taxpayers in every school district where ACSI schools exist. The second is an even greater subsidy: the graduating, into our society, of streams of well trained young people whose lives are grounded in decency and traditional morality.

But the maintaining of fine religious schools such as those of ACSI is accomplished only at the great personal sacrifice which parents, teachers and administrators in these non-tax-supported schools make. They do their superb job for their youngsters with an economy which is not only admirable, but which is vitally necessary. There is no fat in their budgets. And there is no source from which they can pay for forms of financially burdensome regulation which are not provably required in the name of some supreme public interest.

The existence of these schools depends upon their being able to enjoy the liberties which our Constitution intends that these schools, and the parents who support them, shall have.

As ASCI presents its testimony today, ACSI would like to believe that the "Americans With Disabilities Act of 1989" is in its genesis, that its sponsors do not regard it as the perfect and final word on the subject it addresses. ACSI would like to believe that, in their commendable effort to legislate on behalf of justice for the handicapped, the matter to which I will now direct your attention was left unexamined. Hence we would hope that, early on, before your bill would be plunged into heated controversy, it would be amended to remove the problem which I will now discuss.

The "Americans With Disabilities Act of 1989" poses a very distinct threat to the liberties of churches and religious schools. It should be amended to exclude them. ACSI schools have always solidly supported the rights of handicapped persons, and have always - as a matter of Christian principle - opposed discrimination against handicapped persons and the stereotyping of them (just as they reject racial discrimination). ACSI schools teach and preach the compassion of the Good Samaritan.

Why then does ACSI oppose this bill as it is presently drafted?

I begin with the bill's definitions:

Section 401(2)(A) contains an unusual definition of "public accommodations." It embraces private accommodations. Parallel provisions in many, if not most, state statutes carefully (and sensibly) exclude truly private accommodations from the term. Pennsylvania's Human Relations Act, for example, defines "places of public accommodation" with the specific reservation that that does not cover "facilities distinctly private." The distinction is important, because without it, nothing is left outside the reach of the state. Maybe some things should not be left outside the reach of the state, but (as I shall shortly explain) churches and religious schools are not among those things.

Everybody should understand that the "Americans With Disabilities Act" (which I shall henceforth refer to as the "ADA bill") does indeed regulate churches, religions and religious bodies of every type. First, it defines "public accommodation" as "privately operated establishments . . . used by the general public as . . . visitors, or which are potential places of employment" and "whose operations affect commerce." The last-named part of the definition ("whose operations affect commerce") is not limited even to the broad scope often given to the concept of activities affecting interstate commerce, because the text goes on to actually list specific entities which it says are "public accommodations." The text embraces all sorts of places, some of which, we would think, could be absolutely private (e.g., "recreation facilities") and one of which is private ("private schools"). Churches plainly fall within this definition.

While ACSI is deeply concerned over the bill's attempt to regulate churches, it is specifically concerned over the bill's coverage of religious schools. A high majority of religious schools are church-operated. Under familiar decisions of the Supreme Court of the United States, those schools are inseparable and integral parts of the church entity and would have no existence except as such. A minority of religious schools, though not church-operated, are similarly pervasively religious ministries. The providing of religious education has been thoroughly recognized by our courts as an exercise of religion. Lemon v. Kurtzman, 403 U.S. 602, 616 (1971). The Constitution protects many more aspects of religion than worship; it protects the full "free exercise of religion." Three principles have been held by the Supreme Court to come into play when government seeks to regulate religious exercise in a way injurious to religious exercise. Government must prove that a "compelling state interest" - that is, some supreme societal interest as contrasted with a general public interest - requires it. It must also show that no less restrictive alternative means exist whereby the state's interest may be achieved. Hobbie v. Unemployment Appeals Commission, 480 U.S. 130, 141 (1987). And the regulation must not involve government in excessive entanglements with religious institutions. Lemon v. Kurtzman, supra. All three of these factors disqualify the ADA bill constitutionally in its attempt to regulate religious schools (as indeed in its attempt to regulate churches). I will address these points in light of the ADA bill. I begin, however, with the threshhold question of whether ACSI is correct in its view that the bill, if enacted, would be injurious to churches and religious schools.

There are two broad areas of injury which application of the bill to churches and religious schools will entail: (1) economic cost, (2) the liberty of religious entities to self-governance, especially in matters affecting morality.

I have detailed for you a very basic fact relating to ACSI's schools: their financial status. They enjoy no subsidy from the state, no federal financial assistance. These they reject on religious grounds. Not a single ACSI school has yet received a complaint of discrimination against the disabled, and ACSI is resolutely opposed to such discrimination. But ACSI schools do not possess the financial means to comply with the potential costs which would be imposed by the ADA bill.

The term, "auxiliary aids and services" (see Page 5, Section 3) is very broad - especially the term "acquisition or modification of equipment or devices," and the even broader term "other similar services and actions." Section 402 makes it discriminatory to fail to remove "architectural barriers . . . that are structural in nature in existing facilities." This can involve a financial nightmare for many a small religious school or church.

Further, totally unacceptable to churches and religious schools, is a related financial matter. Let us imagine Calvary Christian School, with its small, one-story building, its enrollment of 150 children, its fine educational record, and its small operating fund which is the product of hard sacrifices by parents and teachers. It gets not one dime of federal or state or local financial assistance. Must the school building be altered, must a range of "auxiliary aids and services" be provided on the ground that one, or a few, children, presently enrolled, have disabilities - especially if their parents are willing to forego those aids? The situation I describe here is not untypical of religious schools.

Certain clauses in the bill seem designed to allow some exceptions, or relief, in respect to those requirements. For example, Section 402(b)(3), making it discriminatory to fail to provide "auxiliary aids and services," adds the words, "unless the entity can demonstrate that taking such steps would result in undue burden." That is small comfort. It really means that the religious school would be forced to disclose its financial records to government in order to hope to prove, to a government agent's satisfaction, that the burden would be "undue." So it is also with subsection (4)(A) relating to failure to remove architectural barriers. The text seems to say that this failure does not amount to discrimination if the removal is not "readily achievable." It may be "readily achievable" structurely, but how about financially? The enforcing officer, under this text, need not take the financial burden into account.

The ADA bill treats religious schools as though they were public, or publicly aided, institutions, able to draw upon the public treasury in order to comply with any regulation that may be imposed. The fact that they cannot do for people everything a government institution can do should not mean that religious schools must close their doors. They make too great a contribution toward a safer, saner society to permit that. Above all, the Constitution bars legislatures from unreasonable, harmful regulation of religious life and activity. Further - do not forget: religious schools are voluntary associations. People come to them because they want to. They and churches are not places where the public is forced to go. ACSI's parent groups heartily approve of ACSI's excellent and safe schools just as they are. And that includes parents of children with disabilities.

I must ask: did the sponsors really intend this measure to cover churches and religious schools?

I now turn to the second area of potential injury to churches and religious schools threatened by ADA. Here I deal with their rights of self-governance in respect to the moral requirements which they must observe. The ADA's definition of "disability," with respect to an individual, includes "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." Such persons must be given "reasonable accommodation." "Reasonable accommodation" includes making facilities "readily accessible" to such persons, and doing "job restructuring," modifying work schedules, etc., in order to accommodate the particular disability. Two situations, under that definition, give ACSI profound concern. One relates to alcoholism and drug abusers. The other relates to AIDS.

As to alcoholism or drug abusers, the "defense" given in Section 101(C)(2)(A) against charges of discrimination is unsatifactory. That subsection says only that a church or religious school may apply a "qualification standard" to conduct, he or she will not be permitted employment in an ACSI school, irrespective of whether or not that individual poses a direct threat to the health or safety of the children or staff. On a health basis, we will not risk "indirect" threats. On a moral basis, we will not employ or enroll those whose conduct is violative of Christian moral principles.

These, then, are the areas of injury which we see posed by the ADA bill. Measured against the three constitutional standards to which I referred earlier, it seems clear that your bill should be amended to exclude churches and religious schools. No compelling state interest justifies its imposition on churches and religious schools. There exists no evidence whatever that they are engaged in disobedience to the Rehabilitation Act of 1973. The ADA bill would involve the federal government in the kind and degree of activities and surveillance with respect to religious bodies which Supreme Court decisions have regarded as impermissible. For example, the "reasonable accommodation" requirement is made to include "job restructuring, part-time or modified work schedule . . . adoption or modification of procedures or protocols . . ." These governmentally imposed requirements intrude upon the self-governance rights of religious entities.

With that in mind, we must turn to what the Supreme Court has actually said about governmental entanglements protect itself against such a charge by the alcoholic or drug abuser but only if his or her use of alcohol or drugs does "not pose a direct threat to property or the safety of others in the workplace or program." We beg you to understand that, on the clearest grounds of religious teaching, ACSI schools cannot undertake any employment of alcoholics or drug abusers, regardless of whether his or her use of alcohol or drugs poses any threat - direct or indirect - to the property of the school or the safety of the children or staff. Not only that: ACSI schools do not and will not employ any users of alcohol or drugs, irrespective of any question of abuse. ACSI's schools exist to foster the Christian well-being of children. You must understand - and now is the time for you to know this: ACSI's schools would be forced to discriminate - and thus to disobey this law, should it be passed - were it to seek to impose on churches and Christian schools this unfortunate requirement.

This but forces us again to ask: did the drafters of this bill seriously intend to apply it to churches and religious schools?

Next, as to the question of AIDS. You must understand that ACSI's position on homosexuality - widely shared by others - is based on Biblical conviction and will not be altered. Our schools will not employ homosexual persons. If an individual has AIDS, and that has resulted from immoral with religious schools. In the 1970s the National Labor Relations Board made a series of attempts to fasten its jurisdiction upon religious schools. It argued that the National Labor Relations Act was intended to protect all employees; that it contained no religious exemption; that it represented a strong public interest; that all employers should be regulated alike and that exemptions should not be recognized. The Supreme Court, in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), held the NLRA not to apply to religious schools, based on its legislative history. The Court said it did not find an "affirmative intention of the Congress clearly expressed" to subject religious schools to the NLRA. But the Court came to its conclusion in light of the extreme concern it expressed over the religious liberty of religious schools and the dangers of "excessive entanglements" between government and religious institutions. The Court cited the case of Walz v. Tax Commission, 397 U.S. 664 (1970), saying that, in cases where a government regulation may impinge upon the freedom of religious bodies,

> ". . . the questions are whether the involvement is excessive, and whether it is a continuing calling for official and continuing surveillance leading to an impermissible degree of entanglement."

To conlude:

We again raise the question: Do the sponsors of ADA actually intend to apply it to churches and religious schools (most of which are church ministries)? My guess is that, with a good-willed attempt to legislate generally for those with disabilities, they have simply failed to focus on the fact that religious bodies are, in important ways, legally exceptional under our Constitution. If the sponsors did, in fact, intend the ADA bill to regulate churches and religious schools, then we hope that the Committee will see fit now to amend it them of the ADA bill.

I close by presenting to you a statement of a very special person who came to my attention just last week. She is Dr. Sharon Hughey, an individual who has been totally blind from birth, the holder of a Ph.D. in clinical psychology from Fuller Graduate School of Psychology, and who presently works as a psychotherapist with Metro Maryland Counseling Center in Timonium, Maryland. When she called me, she had just heard of the ADA bill. In her statement, which I have attached to mine, she gratefully addresses Senator Harkins as "a friend of the disabled for a long time" and she commends him for his "commitment to ensuring that the rights of the disabled are enforced." She nevertheless states that she believes ADA's definition of "disability" is too broad, and that she fears the bill will adversely affect religious schools. I earnestly commend her statement to you. ACSI agrees with it 100%

STATEMENT OF
DR. SHARON HUGHEY
ON
"AMERICANS WITH DISABILITIES ACT OF 1989"
BEFORE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
SUBCOMMITTEE ON THE HANDICAPPED
MAY 10, 1989

Mr. Chairman, members of the Committee, ladies and gentlemen, thank you for allowing me to submit testimony for this hearing. My name is Dr. Sharon Hughey. I speak, first of all, as a disabled person who has demonstrated for and been an advocate of the rights of disabled persons for a long time. However, I also speak because I believe that the "Americans with Disabilities Act of 1989" is too broad and inclusive in its definition of who is disabled, and will adversely affect private religious schools.

I hold a Bachelor of Arts degree in psychology from Gordon College, (Wenham, MA). I obtained my Master of Divinity degree from Fuller Theological Seminary, Graduate School of Theology (Pasadena, CA) which is accredited by the Western Association of Schools and Colleges. My Ph.D. in clinical psychology is from Fuller Graduate School of Psychology, a program approved by the American Psychological Association. I presently work as a psychotherapist with Metro Maryland Counseling Center, in Timonium, Maryland.

My interest in disability issues grew out of the fact that I am totally blind from birth. I began to think seriously about the social, political and economic aspects of being disabled which led to the completion of my doctoral dissertation entitled "Theology Students' Attitudes Toward Disabled People with Reference to Dogmatism, Intolerance of Ambiguity and Contact."

I have worked extensively with disabled people and the people who work with them. As a caseworker at an agency for the blind for two years, my responsibilities included conducting intake and peer counseling sessions, advocacy, case management, and teaching braille, and home and personal management (especially for the newly blind). I acted as a consultant for another agency serving developmentally disabled blind individuals in order to assist them in improving the prevocational rehabilitative services they offer. For a year, I conducted psychotherapy with newly injured paraplegics and quadraplegics on a spinal cord unit of a V.A. medical center. I have also worked for two years at a board and care facility for dual diagnosis clients - developmentally disabled clients many of whom are also psychotic. I have conducted psychotherapy with many disabled individuals during my internships, and continue to do so. In July, 1988, I conducted a workshop on how churches can assist blind individuals at a national conference on the church and the disabled.

Senator Harkin, you have been known as a friend of the disabled for a long time, and I commend you for your commitment to ensuring that the rights of the disabled are enforced. I am extremely pleased that a bill of this nature is being considered. However, I find myself in the awkward and unfortunate position of being unable to support this bill in its entirety as it now stands.

My first concern has to do with the definition of disability which I find too broad and inclusive. For example, I have difficulty thinking of drug addition and alcoholism as disabilities in the classic sense of the word. A religious educational institution should not be forced to hire, or keep in its employ, someone who is currently taking drugs or using alcohol, whether or not his or her ability to teach is affected, because such behavior is in violation of the moral code and doctrinal statement essential to the very existence of that institution. Also, a Christian school should be allowed to terminate the employment of someone with AIDS, if it was contracted as a result of homosexual behavior, or intravenous drug use, because such behavior is in violation of the moral code by which anyone who applies for such a position would normally agree. Forcing Christian schools or churches to begin or continue to employ people whose moral behavior contradicts the teachings espoused by such organization is religiously discriminatory. Laws requiring Christian organizations to hire people who do not adhere to the doctrines of such organizations are in violation of the First Amendment. No institution should be forced to hire people who cannot agree with their statement of faith and conduct.

My second concern has to do with the issue of federal funding. Christian institutions which do not receive federal funds should not have to comply with extremely burdensome federal regulations. Most Christian schools operate on tight budgets and do not have federal funds available to them which would assist them in making architectural changes necessary to comply with this bill. Forcing them to comply means discrimination against people who use these organizations by virtue of the fact that such schools would be forced to close if they did not have the money necessary to comply. They could state that such compliance would mean financial hardship, but there is no guarantee that the regulations written to enforce this bill would be written in such a way as to grant them exemption. Most Christian schools do not have the money to hire enough staff to give disabled students the educational opportunities enjoyed by other students. I do believe that wherever possible, Christian schools and churches should do everything within their power to serve the disabled. However, forcing them to make expensive changes without providing funding for them to do so is religious discrimination because it forces them to close their doors, or at least, puts them under great financial strain. The parents who pay taxes for the public schools also pay tuition for private schools. These schools rarely receive any benefits from the taxes these parents pay.

Finally, it makes no sense to insist that expensive ramps be built and transportation be purchased if there is no disabled student currently enrolled in a particular Christian school. Were a student to apply, some of these changes might make sense. Doing all the construction before it is even known if students would attend is like hiring an interpreter to sit in a classroom of hearing students even if there is no deaf student present.

In view of these areas of concern, I recommend that you reconsider inclusion of religious schools in the Americans with Disabilities Act of 1989. Such institutions should make every effort to assist the disabled (without being monitored by federal government) whenever such methods are financially responsible, and/or would not contradict the moral code or doctrinal views of such institutions. The major reason Christian schools were created was to provide education that included spiritual and moral components not available in the public school. Insisting that these institutions conform to the standards for public schools reduces them to privately funded secular institutions.

Prepared Statement of Neil F. Hartigan

Thank you, Senator Harkin, Senator Kennedy and my Illinois colleague Senator Simon for giving me the opportunity to testify in support of the Americans with Disabilities Act of 1989. As Illinois Attorney General, I have observed firsthand the daily instances of discrimination that occur against persons with disabilities: being unable to hop a bus to work because they use a wheelchair; being forced to enter a building through the loading dock because there are steps to the main entrance; being unable to attend a town council meeting because it is held on the 2nd floor of a non-elevator building. You have just heard firsthand reports of similar, inexcusable instances of discrimination against persons with disabilities. Such experiences should not be a part of anyone's life in this land of opportunity. These examples of discrimination on the basis of disability are some of the concerns that the Act before you today is designed to address.

In 1983, shortly after I became Attorney General, I established a Disabled Persons Advocacy Division in my office -- the first and only full-fledged division in any Attorney General's office in the country where staff are devoted full-time to disability rights issues at the state level. The accomplishments of that division, working together with an Advisory Council I appointed comprised of over 70 leaders in the disabled community, have been many. Highlights include:

* Drafting and passage of the Illinois Environmental Barriers Act, a law requiring structural access in new

construction and remodeling of all publicly and privately owned facilities held open to the public and to certain multistory housing units. Since the fall of 1985, we have successfully resolved over 3000 access complaints.

- Legislation creating a Comprehensive Health Insurance Plan for Illinois offering adequate and affordable health insurance coverage to persons with such disabilities as cancer, arthritis, diabetes, sickle cell anemia and heart disease. We take particular pride in the implementation of this Plan, which we successfully fought for through five long years of complications and setbacks.
- Legislation in other areas such as strengthening the states's parking provisions for persons with disabilities, provision of TDD's (telephones for the deaf) in transportation facilities, improvements in special education making it more responsive to the needs of children with disabilities and improved access to polling places.

We have also been involved in litigation to insure that mainline buses are lift-equipped in the Chicago service area so people with disabilities can get to work, to social events and to school. In the next several months, 700 lift-equipped buses will be on the Chicago streets, providing mainline access for people with disabilities for the first time in the city.

We also do extensive public education about the Illinois Human Rights Act, the broad state civil rights law that includes protection from discrimination for persons with disabilities in such key areas as housing, employment, financial credit and access to public accommodations and services.

In my on-going daily activities in the disability rights area over the past six years one theme emerges as a constant: in order to surmount the attitudinal and architectural barriers that people with disabilities face every day a federal commitment is needed. The time is long past due to make equal opportunity a reality for all people. We fail to confront the true scope of the problem if we consider only the most dramatic examples of discrimination. It is the ordinary daily routines that most of us take for granted -- going to work, to school or to a movie -- that illustrate how many barriers our society truly imposes on people with disabilities. In Illinois, we have made significant progress in removing these obstacles. But much remains to be done. People with disabilities should not have to win their rights on a state-by-state basis. Equal opportunity is not just an Illinois principle; its an American principle. A coherent national policy in this area is long overdue.

The Act before you this morning is structured to accomplish that goal: it will put persons with disabilities on equal footing with other Americans. Title III of the Act requires public services -- at all levels including state and local -- to be provided in a non-discriminatory matter. Those of us in public service should be especially aware of the fact that our constituency, the public, obviously includes people with disabilities. But as Attorney General I have had innumerable complaints regarding lack of access to public services -- people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building. Children are unable to participate in park district programs because they are visually impaired and function with a guide dog -- and the park has a "no dogs" rule.

Each of these examples violates our state law in Illinois, giving us a tool to address the discrimination. But people with disabilities should not have to fight these battles in every state. This is a crucial area where the federal government can act to establish uniform minimum requirements for accessibility. Under current federal law, the Rehabilitation Act (commonly referred to as "Section 504") non-discrimination requirements are tied to the receipt of federal financial assistance. Unfortunately, what this translates to is total confusion for the disabled community and the inability to receive consistent treatment. Where there is no state law prohibiting discriminatory practices, two programs that are identical except for funding sources can treat people with disabilities completely differently. One can discriminate; the other cannot. The ADA will resolve this problem by applying uniformly and by requiring that public services, government services, be available to all.

Title III of the Act also requires access to public transportation provided by public entities. This section is critical: transportation is the linchpin that makes all other aspects of disability rights meaningful. Employment opportunities offer no opportunity at all if you can't get to the job site. Accessible design in theaters, restaurants and other recreational facilities offer no opportunity to relax or play without accessible transportation to get you there.

There will unquestionably be major cost involved in complying with the Act's requirements concerning new buses, new railcars, access to stations and general program access. But there are major costs involved when our society is not accessible for everyone: the continued, forced isolation of literally millions of Americans; the lost productivity and lost tax revenue; the continued fostering of dependence on government subsidies by people who would prefer to pay their own way and work if we can make it possible. By closing the doors of the bus or train on people with disabilities we maintain an insurmountable barrier.

However, it would be a cruel hoax to hold out new hope for persons with disabilities but fail to assure that funds are available to make this hope a reality. This very nearly happened in Illinois, when the law creating the new comprehensive health insurance plan sat on the books for two full years without the necessary funding. Speaking from that experience, I know that the disabled community is justifiably wary of empty promises. I urge this committee to take the appropriate steps to assure an increased flow of federal dollars to the states for transportation services when the Act becomes law.

Title IV of the Americans With Disabilities Act is in effect the other side of the coin from Title III. It requires that public accommodations and services that are privately owned be accessible to persons with disabilities. This requirement parallels Illinois law and is both a logical and enforceable standard. Protections such as those afforded in the Act provide no more than what the general public takes for granted: the ability to go to work, relax in the park, eat dinner out and go to a movie.

The best way to illustrate the scope of the bill is to consider some examples. Illinois law currently extends to privately owned public accommodations so I can provide some firsthand experience on the benefits of the proposed coverage.

We received a complaint in my office that an airport limousine service that provided transportation between the suburbs and O'Hare was charging a double fee to persons who are visually impaired and accompanied by a guide dog. As if that wasn't enough, our investigation discovered that the discrimination wasn't limited to people with visual impairments: people who use wheelchairs were also charged double because of their "excess baggage." We utilized the public accommodations section of our

Interestingly, we have received a lot of deliberate "wrong numbers" -- individuals who are deaf or hearing impaired calling our office for assistance because the arm of government they need to reach is not accessible to them.

In part to address this problem, Illinois has recently enacted a two part program that my office has been integrally involved in implementing, to provide greater communication access for persons with hearing impairments. Through a per line surcharge paid by all telephone customers in the state, free TDD's are distributed to qualified consumers who are severely hearing impaired, deaf, or deaf and blind. Phase II of this program requires the provision of 24 hour voice relay service. Such a service enables a TDD user to communicate with a voice user through a relay operator. Consider these situations where telephone access is so essential:

* A person who is deaf awakens to discover his house is on fire. He cannot call for help. He must run to a hearing person's home to call for emergency assistance and even then may not be able to communicate the nature of the emergency.

* A woman who is deaf is watching closed caption T.V. Her husband collapses from chest pain. She cannot herself call the paramedics and precious minutes are lost seeking assistance.

state Human Rights Act to put an immediate end to these practices. If the double-fare practice had applied to other minorities, federal law would be applicable nationwide. Such protections should now be afforded to persons with disabilities.

We also receive literally hundreds of complaints regarding structural access to facilities. Two state laws, one of which we wrote, require access to new construction and remodeling and require reasonable accommodation to services in older buildings. All of us would agree that the time is long gone when it was legal -- or morally acceptable -- in our society for public facilities such as restaurants, theaters, pools and office buildings to hang signs saying "whites only". But a restaurant or theater with steps to its entrance and no ramp or an office building with bathrooms upstairs and no elevator may as well hang a sign that reads "able-bodied only" because that is the practical effect of structural inaccessibility.

Experience in Illinois has shown that the cost of providing access in new construction is minimal -- just 1/2% to 2% more. We cannot continue to accept the discrimination that results from structural inaccessibility. The bill before you addresses this concern. The Act requires accessible design in new construction and remodeling and program or service access where construction is not triggered. This has worked in Illinois; I believe it can and must work for the country.

In 1985 I installed TDD's -- telecommunications devices for the deaf -- in all 13 offices of the Attorney General statewide.

Even the relatively mundane tasks of life -- making a doctor's appointment or a dinner reservation are impossible. Without communication access, "phone first" is a cruel joke.

Title V of the ADA requires that relay service be provided by common carriers or by an entity designated by the state, as we have done in Illinois. This will open telephone communication lines to the hearing impaired community for the first time -- a long overdue step.

In Illinois, I have made disability rights issues a priority. You have an opportunity to make the lives of millions of Americans fuller and more productive. I urge your support for this Act and I pledge to lend my support in any way I can.

Thank you.

News from Senator

BOB DOLE

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FOR IMMEDIATE RELEASE
MAY 10, 1989

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STATEMENT OF SENATOR DOLE
TESTIMONY ON AMERICANS WITH DISABILITIES ACT
LABOR AND HUMAN RESOURCES COMMITTEE
MAY 10, 1989

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, AND MEMBERS OF THE DISABILITY COMMUNITY, I WOULD LIKE TO THANK MY COLLEAGUES FOR THIS OPPORTUNITY TO PRESENT MY VIEWS ON EXPANDING THE CIVIL RIGHTS OF OUR DISABLED CITIZENS. LIKE MY COLLEAGUES, I BELIEVE WE NEED TO PROTECT PERSONS WITH DISABILITIES FROM DISCRIMINATION IN EMPLOYMENT, EDUCATION, TRANSPORTATION AND IN ANY OTHER AREA WHERE OUTRIGHT DISCRIMINATION EXISTS. MY CONCERN LIES IN HOW WE GO ABOUT ACHIEVING THESE PROTECTIONS, BECAUSE THEIR IMPLEMENTATION WILL AFFECT MORE THAN JUST THE DISABILITY COMMUNITY.

I DO BELIEVE THE AMERICANS WITH DISABILITIES ACT (ADA) CORRECTLY PLACES ITS EMPHASIS ON THE EMPLOYMENT AREA. IN MY VIEW, THIS IS A STRENGTH OF THIS YEAR'S VERSION OF ADA AS COMPARED TO LAST YEAR'S. WE MAY BE ABLE TO ARRIVE AT SOME SATISFACTORY AGREEMENT ON THIS PART OF THE BILL. BY THE YEAR 2000, ACCORDING TO THE LABOR DEPARTMENT, WE WILL BE FACING A SERIOUS LABOR SHORTAGE. WE NEED TO MAKE CERTAIN THAT WE ARE FULLY UTILIZING THE POTENTIAL OF EVERY INDIVIDUAL WITHIN OUR SOCIETY.

THERE ARE FEW SITUATIONS WHICH ARE MORE DEVASTATING BOTH FOR INDIVIDUALS AND FOR OUR COUNTRY THAN UNWARRANTED DISCRIMINATION. DISCRIMINATION AGAINST PERSONS WITH DISABILITIES IS NOT ONLY A BLOW TO AN INDIVIDUAL'S BASIC DIGNITY, BUT ALSO NEGATIVELY IMPACTS ON SOCIETY BY LIMITING SUCH INDIVIDUAL'S UNIQUE CONTRIBUTIONS. FOR EXAMPLE, AS WAS SO ELOQUENTLY EXPRESSED AT THE HEARINGS YESTERDAY, PEOPLE WITH DISABILITIES WANT TO WORK. THEY WANT TO PAY THEIR OWN WAY, TO CONTRIBUTE TO OUR SOCIETY. UNWARRANTED DISCRIMINATION DENIES THEM AND OUR COUNTRY THE BENEFITS OF THIS LABOR.

AS A MEMBER OF CONGRESS WHO HAS HAD PERSONAL EXPERIENCE WITH A DISABILITY, AND AS ONE WHO HAS CONSISTENTLY DEDICATED HIS PUBLIC CAREER TO ASSISTING PEOPLE WITH DISABILITIES, I STAND ON MY COMMITMENT TO BUILDING THE BEST AMERICA POSSIBLE FOR PERSONS WITH DISABILITIES. I AM STRONGLY IN FAVOR OF ENHANCING THE CIVIL RIGHTS OF PEOPLE WITH DISABILITIES -- I SUPPORT THE CONCEPT OF THE AMERICANS WITH DISABILITIES ACT, BUT I DO NOT SUPPORT ALL OF THE SPECIFIC LANGUAGE THAT I AM FAMILIAR WITH IN THE DRAFT THAT I HAVE HAD A CHANCE TO REVIEW. THE PRIMARY REASON FOR MY CAUTION IS THAT I'M REALLY NOT CERTAIN WHAT A LOT OF THE LANGUAGE IN THE CURRENT DRAFT DOES. SOME OF IT IS SO VAGUE THAT IT IS LIKELY TO CAUSE A FLOOD OF UNNECESSARY LITIGATION. WHILE I SUPPORT THE EMPLOYMENT GOALS OF THE AMERICANS WITH DISABILITIES ACT, I DO NOT THINK WE NEED TO CREATE ADDITIONAL EMPLOYMENT OPPORTUNITIES FOR LAWYERS. LATER IN MY TESTIMONY, I WILL CITE EXAMPLES OF SOME OF THESE AREAS OF AMBIGUITY.

I STRONGLY SUPPORT THE ELIMINATION OF BARRIERS FOR PEOPLE WITH DISABILITIES, BUT I ALSO CARE WHETHER WE GO ABOUT ACHIEVING THESE GOALS IN A CONSTRUCTIVE WAY -- ONE THAT WILL NOT CREATE AN UNREASONABLE BURDEN ON THE PRIVATE SECTOR, WHICH WILL BE REQUIRED TO IMPLEMENT THE PROVISIONS OF THE LEGISLATION.

I FIRMLY BELIEVE THAT OUR SOCIETY WILL ONLY BE CHANGED WHEN PEOPLE FOCUS ON THE CONTRIBUTIONS PEOPLE WITH DISABILITIES CAN MAKE -- ON WHAT THEY ARE CAPABLE OF DOING -- NOT ON THEIR LIMITATIONS. MY RECORD IN THIS AREA IS CLEAR, AND IT IS ONE THAT HAS BEEN ESTABLISHED OVER DECADES. LET THERE BE NO QUESTION ABOUT MY SOLIDARITY WITH THE DISABILITY COMMUNITY.

I KNOW THAT MANY OF MY FELLOW AMERICANS WITH DISABILITIES HAVE FOUGHT THEIR OWN BATTLES, FACED THEIR OWN CHALLENGES AND COME TO THEIR OWN PERSONAL UNDERSTANDING OF COURAGE.

YES, THE WORLD CAN BE IMPROVED, AND SO CAN THIS LEGISLATION. THE RECENTLY INTRODUCED AMERICANS WITH DISABILITIES ACT HAS SOME SERIOUS FLAWS, BUT ONES I BELIEVE CAN BE ADDRESSED. IN PURSUING A COURSE THAT WILL LEAD TO A BARRIER-FREE WORLD FOR PEOPLE WITH DISABILITIES, WE NEED TO ADDRESS THE CONCERNS OF ALL THOSE WHO WILL BE AFFECTED.

BEGINNING OF PROCESS

THE INTRODUCTION OF THIS BILL AND THESE HEARINGS MARK THE BEGINNING OF THE EXAMINATION OF A VERY SIGNIFICANT AND HIGHLY COMPLEX ISSUE: CIVIL RIGHTS PROTECTIONS FOR PERSONS WITH DISABILITIES. I BELIEVE THAT OUR EXTENSIVE, AND OFTEN UNWIELDLY, LEGISLATIVE PROCESS WAS DESIGNED TO PERMIT THE FULL EXAMINATION OF ISSUES AS FAR-REACHING AND SIGNIFICANT AS THIS ONE IS, AND I AM PLEASED THAT THIS PROCESS IS FINALLY BEGINNING.

I INTEND TO USE THIS PROCESS TO REVIEW THE ISSUES RAISED SO THAT WE ARE ASSURED THAT THE LEGISLATION WE ENACT IS LEGISLATION WHICH CAN BE IMPLEMENTED, WHICH IS RESPONSIBLE, AND RESPONSIVE TO THE CONCERNS OF ALL THOSE WHO WILL BE AFFECTED. IF THE PROCESS IS SUCCESSFUL, WE WILL HAVE LEGISLATION THAT WILL WORK TO REMOVE OBSTACLES AND PROMOTE OPPORTUNITIES.

WHAT I HOPE TO AVOID IS SOME OF THE PROBLEMS WE FACED WHEN SECTION 504 WAS FIRST ENACTED AND THERE WAS SUCH A LONG DELAY IN THE IMPLEMENTATION OF THE LEGISLATION -- YEARS IN FACT.

CONCERNS - COST

LET ME TALK NOW ABOUT SOME OF THE SPECIFIC AREAS OF CONCERN ON WHICH I HOPE THE COMMITTEE WILL FOCUS. FIRST, THERE IS THE ISSUE OF COST. WE ARE ASKING FOR TROUBLE IF WE STICK OUR HEADS IN THE SAND AND PRETEND THAT THE COST OF IMPLEMENTING THIS LEGISLATION IS NOT AN AREA WHICH NEEDS CONSIDERABLE EXAMINATION. HOW CAN WE POSSIBLY EXPECT SMALL BUSINESS TO BE PREPARED TO ENDORSE THIS LEGISLATION AND SUCCESSFULLY COMPLY WITH IT, IF WE CAN'T TELL THEM HOW MUCH THIS LEGISLATION WILL COST?

RAISING THE QUESTION OF COST DOES NOT MEAN I SUPPORT DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES. COST ALONE IS NOT A REASON FOR FAILING TO GO FORTH WITH COMPREHENSIVE CIVIL RIGHTS LEGISLATION FOR PEOPLE WITH DISABILITIES -- BUT IT IS A REASON TO SUBJECT IT TO STUDY AND REFINEMENT.

THE RELATIVE COSTS AND BENEFITS ASSOCIATED WITH THE ADA NEED TO BE EVALUATED. MANY PROVISIONS HAVE COSTS, BUT THERE DOES NOT NOW EXIST AN ANALYTIC BASE FOR DETERMINING THE SIGNIFICANCE OF THOSE COSTS AND HOW THE COSTS COULD BE MOST EFFICIENTLY ALLOCATED. IT IS AN APPROPRIATE ROLE FOR THE REGULATORY AGENCIES TO HELP US DEVELOP SUCH AN ANALYTICAL BASE THAT WILL ASSIST IN EVALUATING THE IMPACT OF THIS LEGISLATION. THE PRIVATE SECTOR COULD ALSO BE OF HELP TO US IN THIS EFFORT.

FOR EXAMPLE, AT&T HAS ESTIMATED THAT ITS COSTS FOR COMPLYING WITH THE TELECOMMUNICATIONS PROVISIONS OF ADA WOULD BE $200 MILLION PER YEAR.

OPERATING BOTH LIFT-EQUIPPED BUSES AND PARATRANSIT COULD COST PUBLIC TRANSIT AUTHORITIES $270 MILLION PER YEAR. ONE OF THE BIG QUESTIONS IS WHO SHOULD ULTIMATELY PAY THESE COSTS? AND, WHAT CAN BE DONE TO MITIGATE THE MOST EXTRAORDINARY COSTS?

TRANSPORTATION ISSUES

TRANSPORTATION ISSUES ARE ANOTHER AREA WHERE BALANCE AMONG COMPETING INTERESTS IS CRITICAL. ALTHOUGH THE BILL WOULD REQUIRE NO RETROFITTING, IT DOES REQUIRE THAT ALL STATIONS IN INTERCITY RAIL SYSTEMS BE MADE READILY ACCESSIBLE NOT LATER THAN 3 YEARS AFTER ENACTMENT, WITH A POSSIBLE EXTENSION OF UP TO 20 YEARS FOR EXTRAORDINARILY EXPENSIVE STRUCTURAL CHANGES. THIS MAY PROVIDE SOME FLEXIBILITY BUT ALSO RAISES THE QUESTION OF WHETHER THIS AMOUNT OF TIME IS SUFFICIENT FOR WHAT MAY BE A MAMMOTH AND EXTREMELY EXPENSIVE ENDEAVOR.

REMEDIES

ONE OF THE MOST CRITICAL ASPECTS OF ANY NONDISCRIMINATION LEGISLATION IS THE REMEDIES IT PROVIDES TO ENFORCE RIGHTS. THE AMERICANS WITH DISABILITIES ACT NEEDS STRONG ENFORCEMENT PROVISIONS. HOWEVER, IT ALSO NEEDS PROVISIONS THAT ARE UNAMBIGUOUS AND TAKE INTO CONSIDERATION BOTH THE RIGHTS OF THE INDIVIDUALS WITH DISABILITIES AND THE RIGHTS OF THE OTHER PARTIES WHO WOULD BE IMPACTED. THE BILL BEFORE US TODAY CONTAINS DIFFERING ENFORCEMENT MECHANISMS FOR VARIOUS TYPES OF DISCRIMINATION.

WITH REGARD TO EMPLOYMENT, IT REFERENCES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND SECTION 1981. IN THE TELECOMMUNICATIONS SECTION, THE REMEDIES IN THE FAIR HOUSING ACT AND THE COMMUNICATION ACT OF 1934 ARE INCORPORATED. WITH REGARD TO PUBLIC ENTITIES, THE ACT REFERENCES THE REMEDIES APPLICABLE UNDER SECTION 505.

THIS CREATES CONFUSION -- NOT CLARITY.

MORE IMPORTANTLY, THE REMEDIES PROVIDE FOR ACTIONS BY AN INDIVIDUAL WHO BELIEVES HE OR SHE IS ABOUT TO BE DISCRIMINATED AGAINST. THIS UNPRECEDENTED LANGUAGE COULD OPEN THE DOOR TO FRIVOLOUS SUITS WHICH DO LITTLE TO ADVANCE OUR GOALS OF PROHIBITING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES.

ACHIEVING THE GOAL OF PROTECTING AGAINST DISCRIMINATION WILL REQUIRE CAREFUL ANALYSIS AND COMPARISON OF THIS PROPOSAL WITH EXISTING CIVIL RIGHTS LAWS. THESE STATUTES HAVE DIFFERENT COMPLIANCE STANDARDS AND DIFFERENT REMEDIES. PERHAPS A LEAD ENFORCEMENT AGENCY COULD BE DESIGNATED TO ENSURE ALL ANTI-DISCRIMINATION LAWS ARE ENFORCED IN A UNIFORM MANNER.

CONCLUDING REMARKS

I APPLAUD THE WORK DONE ON THE AMERICANS WITH DISABILITIES ACT, BUT WE ALSO HAVE A LOT OF WORK AHEAD. ITS GOALS OF NONDISCRIMINATION AND INTEGRATION CAN ONLY HELP STRENGTHEN OUR NATION. HOWEVER, THE IMPLEMENTATION OF THESE GOALS MUST BE CAREFULLY CRAFTED.

LAST YEAR, I WAS A COSPONSOR OF THE AMERICANS WITH DISABILITIES ACT, INTRODUCED BY MY FORMER COLLEAGUE FROM CONNECTICUT, SENATOR WEICKER. HOWEVER, I HAD SOME SERIOUS RESERVATIONS ABOUT THE LEGISLATION AT THAT TIME AND EXPRESSED THESE CONCERNS. ALTHOUGH SOME OF MY CONCERNS HAVE SINCE BEEN ADDRESSED, NEW ISSUES HAVE ARISEN. I CONTINUE TO HAVE CONCERNS ABOUT HOW THE AMERICANS WITH DISABILITIES ACT WOULD AFFECT THOSE IT SEEKS TO HELP AND THOSE WHO MUST IMPLEMENT THE CHANGES IT WOULD REQUIRE. IN OTHER WORDS, WE ARE DEALING WITH A SITUATION IN WHICH GREAT DEMANDS WILL BE MADE ON THE PRIVATE SECTOR -- COSTLY ACCOMMODATIONS THAT, IN MANY INSTANCES, WILL EXCEED THE PROTECTIONS UNDER CURRENT CIVIL RIGHTS LAWS WHICH ADDRESS DISCRIMINATION BASED ON RACE, GENDER, AND RELIGION.

REPUBLICANS AND DEMOCRATS ALIKE SUPPORT THE CONCEPT OF EXPANDING CIVIL RIGHTS FOR PEOPLE WITH DISABILITIES -- THIS IS A BIPARTISAN ISSUE. I AM CONVINCED THAT WE CAN REACH A BIPARTISAN CONSENSUS ON HOW TO ACHIEVE THIS GOAL.

# # #

NFIB

National Federation of
Independent Business

STATEMENT OF

Sally L. Douglas
Assistant Director of
Federal Governmental Relations
for Research and Policy

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Senate Subcommittee on the Handicapped
Subject: Americans with Disabilities Act of 1989
Date: May 10, 1989

On behalf of the 570,000-plus small and independent business owner members of the National Federation of Independent Business (NFIB), I welcome the opportunity afforded NFIB by the Chairman and members of the Subcommittee to express our views on the proposed "Americans with Disabilities Act of 1989" (ADA).

For those of you who aren't familiar with NFIB, we are a member-driven organization, comprised of more than a half million owners of small, independently-owned businesses across the nation. Our membership profile closely parallels the national business population: roughly 50% of our members own retail or service enterprises; another 25% are in manufacturing and construction; the remaining 25% operate agricultural,

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The Guardian of
Small Business

transportation, mining, wholesale, and financial, insurance, or real estate enterprises. NFIB's average member has 13 employees and grosses about $350,000 in annual sales.

The proposed ADA represents both a significant expansion of existing civil rights protections for persons with disabilities, and an equally significant expansion of federal regulatory authority over private enterprises. To date civil rights statues have targeted specific entities to shoulder the responsibilities of ensuring equal protections and opportunities to minorities, women, persons with disabilities, and other groups which, for one reason or another, have suffered from discrimination. The ADA's scope, however, is far broader and will impose requirements and enforcement procedures uniformly across the broad spectrum of the business community, affecting thousands, if not millions, of businesses which have not heretofore been affected directly by the Civil Rights Act of 1964, the Fair Housing Act, or the Rehabilitation Act of 1973.

Such sweeping legislation merits -- if not demands -- deliberative analysis and consideration by the Congress and all affected parties. Since our membership ranges across the entire spectrum of American business, the proposed ADA would have a profound impact on the day-to-day operations of these firms. The stakes are high. The right of every American to have the opportunities to realize his or her full potential cannot and should not be denied. Nor should we deny any American the right to conduct his or her life in a reasonable manner, without undue interference from the government. Achieving the proper balance between the rights and needs of persons with disabilities and the rights and needs of American businesses is the challenge we face, and I believe we can succeed if we can work together in the spirit of cooperation.

There is an old Chinese curse which says, "May you live in interesting times." The times we live in are, at the very least, interesting. We are in the midst of the greatest peacetime expansion in our economic history. Vast numbers of new entrants into the labor force have been accommodated, new businesses have been created in record numbers, and in their wake have come new opportunities, new jobs. The small business sector has been termed "the American miracle" by observers in other countries. Many, if not all, Americans have benefitted in some way from this dynamic process.

Yet there are substantial problems facing us today, and more are coming in the near future. There are still disadvantaged groups within our society who have not shared equally in the economic boom. Businesses will be facing an acute labor shortage in the next few years. Noone can predict with any certainty how long our economic expansion will continue, nor can anyone predict with accuracy when our federal budget crisis will be stabilized. Challenges all, and no easy solutions for any of the component parts.

One of the challenges we face is integrating persons with disabilities into the mainstream of American life. Certainly discrimination exists, but in fairness not everyone -- not even all business owners -- willfully and intentionally discriminate against the disabled. This fact needs to be recognized and understood, for it is key to our accomplishing the worthwhile goal of providing the opportunities for persons with disabilities to be judged by their abilities and not their disabilities.

NFIB has been requested to focus our comments about the ADA on Title IV, "Public Accommodations and Services Operated by Private Entities." If I understand correctly the intent of the authors of this legislation, the objective of the ADA is to afford persons with disabilities the same protections currently contained in other federal civil rights laws prohibiting discrimination on the basis of race, sex, national origin, and religion. This is an objective with which hardly anyone could disagree. Yet as written, Title IV appears to go well beyond these protections, introducing new, more expansive concepts for the treatment of persons with disabilities.

First, the scope of coverage is significantly greater than current law. The Civil Rights Act of 1964 covered in essence establishments which lodged transient guests, public eating places, and public entertainment facilities. Subsequent court cases have refined the accommodation list to include businesses which obviously cater to tourism.

Other businesses which have been covered by other civil right statutes are establishments that receive federal assistance in one form or another, and firms that contract with the federal government. Title IV of the ADA, however, covers virtually every business in America. By definition in Section 401(2)(A), businesses that are brought within the scope of the bill are:

> ...privately operated establishments --
> (i)(I)that are used by the general public as customers, clients, or visitors; or
>
> (II)that are potential places of employment; and
>
> (ii)whose operations affect commerce.

The bill then explicitly lists the types of businesses included within this definition. I would be hard put to find a kind of business that is not covered by this list.

Further, the coverage under Title IV extends to "potential places of employment", so Title II and Title IV would appear to be inextricably linked. Clarification is therefore needed as to the exemption expressly delineated in Title II for businesses with fewer than 15 employees (itself an extension from the original 25-employee threshold contained in the Civil Rights Act of 1964). No explicit exemption is included in Title IV. Does this mean that the exemption only applies to the hiring practices of smaller firms (Title II), or does it also apply to "potential places of employment" with fewer than 15 employees (Title IV)? Is there an exemption from coverage in effect under Title IV if the person with a disability enters an establishment with the purpose of gaining employment, and does not apply if he/she enters the same business as a client, customer, or visitor? If the exemption for smaller businesses is meant to apply to both titles, or indeed to the entire bill, might it not better be placed either in the definitional section of the preamble or in Title VI - "Miscellaneous Provisions"?

There is a distinct philosophical difference between the ADA and Title VI of the Civil Rights Act, and the practical implications could well be overwhelming for many small firms. Title VI requires acceptance as its standard of accommodation. The ADA requires much more, requiring specific restructuring of "architectural and communication barriers, removal of transportation barriers, provision for "auxiliary aids and services," and the like.

All of these requirements would incur financial costs of varying amounts, some of which could be substantial for a smaller business. In addition, these firms would be expected to provide different "accommodations" to overcome different disabilities. The language in Title IV demands, in effect, that business owners be prepared for any and all contingencies, since the bill affords protection to all "customers, clients, or visitors" who are persons with a wide range of disabilities.

Further complicating the situation, since by definition Title IV covers all "potential places of employment," all these businesses seem to be required to go to great lengths to "accommodate" persons with disabilities -- even when there is no disabled worker requiring such accommodation.

What is being asked of small businesses is that they perform structural modifications, buy special equipment, provide qualified interpreters, readers, taped texts, other "effective methods", or "alternative methods" aid persons with disabilities -- whether or not any such persons ever make contact with these businesses. Business owners will be perceived as discriminating against persons with disabilities not only if they willfully exclude such individuals, but if they "fail" to make the modifications or provide the services required in accordance with Title IV, unless they can demonstrate that modifications would "fundamentally alter the nature of such privileges, advantages, and accommodations", or they can show that providing auxiliary aids and services would result in "undue burden", or that removal of architectural and communication barriers is not readily achievable. On the last point, however, they must also be prepared to adopt "alternative methods" to achieve accommodation.

What these alternative methods would be would, I presume, have to be decided on a case-by-case basis, but might include items such as a business initiating home delivery of goods and services if the business simply cannot retrofit the facility to overcome barriers. What does the business owner do, for example, as a "potential employer" if the place of business cannot readily be modified? Does he allow the disabled worker to work at home? And doesn't this contravene the requirement in Title I that an individual with a disability must be afforded "an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, "in the most integrated setting appropriate to the individuals' needs" (emphasis added)?

The business owner is subject under the dictates of this bill to the same onerous requirements and enforcement procedures whether discrimination is intentional or unintentional. And since Title IV defines a business as a "potential place of employment", presumably the owner is also subject to the prohibition in Title II against "potential discrimination", that is, the claim of a person with a disability that he/she is "about to be" discriminated against.

All of this is daunting enough to the small business owner, but the enforcement procedures contained in this bill raise even more serious concerns. Different remedies are contained in each title of the bill, and access to multiple remedies is assured. I have already stated that no distinction is made between acts of intentional and unintentional discrimination, and there is nothing in the bill to suggest that first instance violations would be treated any differently than pattern and practice violations.

In Title IV, remedies include private cause of action, possible intervention by the Department of Justice, actual and punitive damages, recovery of attorney fees, and civil penalties. These are significant penalties, particularly for the business owner who neither willfully, intentionally, or with malice discriminates against someone with a disability.

The tone of the bill is substantially different from Title VII of the Civil Rights Act, even though we are told that ADA is intended to afford the same protections as Title VII. Where Title VII encourages conciliation and cooperation, the ADA encourages adversarial relations. No attempt is made to highlight administrative remedies as the first step in reviewing discrimination. Direct resort to civil litigation is the preferred approach in the ADA. Such procedures are a deterrent to conciliation and as such, will prove counterproductive to the purposes of the proposed legislation. Inducements for civil litigation will further clog our courts and result in substantial new grey areas of liability for small business owners who, over the past few years, have already been hit with overwhelming liability insurance rate increases, and in some instances loss of coverage.

There are other, significant problems with this bill: inconsistent standards; direct contravention of the employers' ability to define qualifications for and essential components of jobs in his/her workplace; lack of any clear language to determine who carries the burden of proof in which instance; inconsistencies between Acts, such as the inclusion of drug abusers as disabled individuals under the ADA versus the strict requirements imposed on employers by the drug-free workplace statute; requiring that equal, not comparable, means and outcomes be used in achieving accommodation for the individual with a disability; and the like.

One final general comment remains to be made. The ADA is intended to be implemented in addition to, rather than instead of, existing civil rights statutes pertaining to persons with disabilities. What is being created is a regulatory maze through which small business owners are expected to navigate, with no false steps or detours allowed. In addition to the federal requirements, businesses will also have to comply with pertinent state and local laws. Opportunities for duplication and/or conflicting requirements are rife within this context.

I urge the Subcommittee to deliberate carefully over this legislation. The ADA, if enacted, will be a landmark statute, affecting the day-to-day lives of millions of people. It is critical that a reasonable balance be achieved between the rights of persons with disabilities and the small business community. Let us not, in attempting to provide equal rights to the disabled, create new and different types of disabilities within the job-generating sector of our economy.

I referred earlier to the impending labor shortage, most notably delineated in the Hudson Institute's Workforce 2000 and Opportunity 2000. The shortage promises to have a devastating impact on small firms, by nature labor intensive and traditionally the group that hires new entrants into the labor force.

Even in boom labor markets, small businesses face heavy competition with their larger counterparts. All too often the small business owner hires the new entrant and provides him/her with the on-the-job training he/she needs to build a career. Many skilled workers are enticed away by larger firms offering fast-track career advancement, larger salaries, bigger and better benefits. Yet small business continues to generate new jobs for new workers.

As we approach the end of this century, the pool of available workers will shrink in absolute terms, and the composition of the workforce will change drastically. Competition for workers will be fiercer than ever before. The challenge to small business will be to find ways to integrate individuals outside the economic mainstream into their workplaces, and to do so in an efficient and economic manner so they can continue to compete with larger firms with greater resources. Businesses are, after all, economic institutions by their nature. Small firms who have hired persons with disabilities have found in most cases that the extra effort makes good economic sense. I have no doubt that, faced with the demands of the marketplace, many other small firms will soon learn the same lesson.

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STATEMENT OF
MALCOLM C. GREEN, BOSTON, MASSACHUSETTS
CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF THEATRE OWNERS

MAY 10, 1989

GOOD MORNING. MY NAME IS MALCOLM GREEN. I AM FROM BOSTON, MASSACHUSETTS AND I AM CHAIRMAN OF THE BOARD OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS. WE ARE THE LARGEST NATIONAL ASSOCIATION OF THEATRE OWNERS IN THE WORLD AND REPRESENT OVER 12,000 SCREENS IN THE UNITED STATES. THE MOTION PICTURE THEATRE INDUSTRY HAS BEEN A LEADER IN PROVIDING ACCESS FOR THE DISABLED TO PUBLIC FACILITIES.

I HAVE BEEN IN THE MOTION PICTURE THEATRE BUSINESS SINCE 1946 AND MOST RECENTLY SERVED AS TREASURER OF CINEMA CENTERS, INC. CINEMA CENTERS OPERATES 111 SCREENS IN THE NEW ENGLAND STATES AND IN NEW YORK STATE.

NATO HAS PREPARED A WRITTEN STATEMENT WHICH I AM SUBMITTING FOR THE RECORD AND I WOULD LIKE TO EXTEND OUR REMARKS TO PROVIDE THE MEMBERS OF THIS COMMITTEE WITH SOME OF MY EXPERIENCES IN OPERATING MOTION PICTURE THEATRES FOR MORE THAN 40 YEARS. LAST YEAR MORE THAN ONE BILLION AMERICANS WENT TO THE MOVIES. WE AT NATO ARE VERY PROUD OF THIS FACT.

MY COMPANY, CINEMA CENTERS, INC., IS CONSTANTLY SEEKING FEEDBACK FROM OUR CUSTOMERS. WE WANT TO KNOW WHETHER THEY LIKED THE MOVIE THAT THEY SAW. WE WANT TO KNOW IF THE THEATRE WAS COMFORTABLE; IF IT WAS CLEAN; IF THE PATRON HAD ANY COMPLAINTS.

TO BETTER SERVE OUR CUSTOMERS, WE DEVELOPED A SYSTEM USING COMMENT CARDS. PATRONS WERE ASKED TO COMPLETE THESE CARDS AND MAIL THEM BACK TO US. EACH RESPONSE WAS CAREFULLY SCRUTINIZED. IN RECENT YEARS, ALL OF OUR THEATRES WERE CONSTRUCTED TO PROVIDE WHEELCHAIR ACCESS FOR DISABLED PERSONS. WE HAVE NEVER TO MY KNOWLEDGE RECEIVED A COMPLAINT FROM A DISABLED PERSON THAT OUR THEATRES WERE INACCESSIBLE OR INHOSPITABLE TO THEIR NEEDS. IN MASSACHUSETTS, TEN THEATRES TOTALLING 53 SCREENS, COMPLETED AN INDUSTRY SURVEY ON ATTENDANCE BY PATRONS WITH CRUTCHES, WALKERS AND WHEELCHAIRS DURING MARCH 1989. DURING THIS TIME PERIOD, AVERAGE ATTENDANCE FOR ALL THEATRES WAS 65,807 PER WEEK. OF THIS NUMBER 114 WERE PERSONS WITH DISABILITIES INCLUDING 38 WHEELCHAIR PERSONS, 48 WITH CRUTCHES AND 28 WITH WALKERS. DISABLED PERSONS APROXIMATED LESS THAN 2/10 OF 1% OF TOTAL PATRONS DURING THIS TIME PERIOD.

AS AN INDIVIDUAL AND AS CHAIRMAN OF NATO, I SUPPORT LEGISLATION GUARANTEEING DISABLED PERSONS ACCESS TO PUBLIC FACILITIES AND ACCESS TO JOBS. AT THE SAME TIME, ONE MUST BE REASONABLE. IN A THEATRE, WHEELCHAIR PATRONS MUST BE SEATED EITHER IN THE FRONT OR BACK OF THE THEATRE. TO SEAT A WHEELCHAIR PATRON IN THE MIDDLE OF THE THEATRE WOULD CREATE OBVIOUS SAFETY PROBLEMS IN THE EVENT THAT THERE WAS A NEED TO EMPTY THE THEATRE QUICKLY. STATE FIRE MARSHALS HAVE CONSTANTLY TAKEN THE POSITION THAT WHEELCHAIR PATRONS SHOULD BE SEATED EITHER IN THE FRONT OR THE BACK OF THE THEATRE IN CLOSE PROXIMITY TO AN EXIT. MOTION PICTURE THEATRE STAFFS ARE TRAINED IN THE EVENT OF AN EMERGENCY

TO QUICKLY ASSIST DISABLED INDIVIDUALS. THIS TASK WOULD BE IMPOSSIBLE IF SUCH INDIVIDUALS WERE SEATED IN THE MIDDLE OF THE AUDITORIUM.

ALTHOUGH ALL THE THEATRES THAT WE BUILT IN THE LAST 15 OR 20 YEARS ARE ACCESSIBLE TO DISABLED PEOPLE, I NOTE THAT CERTAIN INNER CITY THEATRES BUILT MANY YEARS AGO MAY NOT HAVE SUCH MEANS OF ACCESS. SOME OF THESE THEATRES ARE IN DEPRESSED INNER CITY AREAS AND ARE STRUGGLING TO STAY OPEN. THEY ARE OF MARGINAL PROFITABILITY BUT SERVE AS A FOCAL POINT FOR ENTERTAINMENT IN THEIR COMMUNITIES. ANY NEW LEGISLATION ENACTED SHOULD RECOGNIZE THAT IT WOULD BE IMPOSSIBLE TO INVEST THE CAPITAL NECESSARY TO BRING SUCH FACILITIES INTO COMPLIANCE WITH A LAW REQUIRING TOTAL ACCESS FOR THE DISABLED. SUCH FACILITIES MUST BE EXEMPT UNLESS AND UNTIL THEY ARE TOTALLY RENOVATED.

SIMILARLY, ELIMINATION OF JOB DISCRIMINATION ON THE BASIS OF DISABILITY IS A CONCEPT THAT MUST BE SUPPORTED, BUT WITHIN REASON. IN A MOTION PICTURE THEATRE SETTING, CERTAIN TYPES OF DISABLED INDIVIDUALS COULD OBVIOUSLY WORK IN CERTAIN JOBS. OTHER DISABLED INDIVIDUALS COULD NOT. THE PHYSICAL LIMITATIONS OF EXISTING THEATRES WOULD PROHIBIT UTILIZING WHEELCHAIR PERSONS FROM OPERATING PROJECTORS. PROJECTION BOOTHS ARE USUALLY LOCATED ABOVE AUDITORIUMS IN RELATIVELY LIMITED SPACE. THEY REQUIRE CLIMBING STEEP STAIRWAYS FOR ENTRANCE. PROJECTOR OPERATORS MUST LIFT HEAVY PLATTERS OF FILM WHICH AGAIN WOULD BE IMPOSSIBLE FOR PERSONS WITH A CERTAIN TYPE OF HANDICAP. RECENTLY A CALIFORNIA COMMISSION SPECIFICALLY EXEMPTED THIS JOB CLASSIFICATION FROM THE

REQUIREMENT OF THE CALIFORNIA ANTIDISCRIMINATION STATUTE. WHILE I DON'T WANT TO APPEAR NEGATIVE, I MUST URGE THE COMMITTEE TO RECOMMEND LEGISLATION THAT IS REASONABLE IN SCOPE AND DOES NOT PLACE UNREASONABLE OR UNDUE BURDENS ON EMPLOYERS.

I THANK YOU FOR INVITING US TO TESTIFY THIS MORNING AND I WILL BE GLAD TO ANSWER ANY QUESTIONS THAT YOU MAY HAVE.

NATO National Association of Theatre Owners

STATEMENT OF NATIONAL THEATRE OWNERS ASSOCIATION

May 10, 1989

RE: Americans with Disabilities Act of 1989

The members of the National Association of Theatre Owners (NATO) operate more than 12,000 motion picture theatre screens in all 50 states. NATO includes the very largest chains in the nation as well as hundreds and hundreds of independent theatre owners.

NATO members provide entertainment that is available to all. Last year over one billion people went to the movies in the United States. Truly, everyone enjoys motion pictures. The young, the old, the highly educated and less highly educated, the wealthy and the economically less fortunate, all have an opportunity to seek out a motion picture that meets their interests and usually for a price of less than $6. Unlike the Broadway theatre, the big city concert or professional sports, where tickets can cost $50 each, motion picture theatres offer entertainment that is economically available to most Americans. The 12,000 NATO motion picture theatre screens are geographically diversified so that almost everybody has a choice of several theatres within a reasonable distance of his or her home.

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Motion picture theatre owners are experienced at moving a large number of people into and out of semi-darkened auditoriums, rapidly and safely. Although motion picture theatre staffs have traditionally included a large proportion of young first time job holders and an increasingly large number of senior citizens, the industry trains its employees to be able to deal with a large number of people in a relatively confined space. Theatre staff members are trained to deal with normal conditions and emergency conditions. Whenever one has a large number of people in a limited physical space, it is essential that preparations be made to deal with the worst case scenario and the theatre industry has accepted this responsibility. Our staff has to be able to move quickly should the need arise. This situation has caused NATO members to spend much time considering the special problems of the disabled both as patrons and employers.

The motion picture theatre industry has been a leader in facilitating innovations in construction to insure that disabled individuals have access to the nation's motion picture theatres. New theatre construction is engineered to provide ramps and auditorium space that permit persons in wheelchairs access to all of the theatre facilities. Restrooms are fully equipped in accord with state and local building codes to meet the needs of the disabled. Special sound facilities are being installed in many auditoriums that will enable hearing impaired individuals to enjoy a "night at the movies."

The National Association of Theatre Owners supports legislation designed to prohibit discrimination on the basis of disabilities but at the same time NATO recommends that Congress recognize that there are certain rules of reason that must be followed in connection with this legislation.

I. ACCESS TO PUBLIC ACCOMMODATIONS

A. New Construction.

NATO supports the concept that new construction should be carefully engineered to insure full access for disabled persons. Theatres should include ramps to permit access to the auditoriums. Seating for persons in wheelchairs should be provided in close proximity to exits within each facility. NATO has compiled data which shows the number of persons in wheelchairs, on crutches, or using walkers, that attend theatres on a theatre/per week basis in various areas of the country.

For example, a wheelchair count was conducted in 28 theatres in Maryland, Virginia, and Pennsylvania from December, 1987, through March, 1988. The results of the survey showed that there was very little usage of the spaces for disabled persons available. Although many of our theatres provide two to four wheelchair positions, the theatres surveyed averaged one to two wheelchair patrons per week.

The survey also showed that over sixty percent (60%) of our wheelchair patrons do not sit in the spaces for disabled persons, they prefer to be removed from their wheelchairs to a theatre seat. Our ushers and door persons provide assistance.

A similar survey conducted in 10 theatres with a total of 53 screens in the state of Massachusetts shows that in a typical week the theatres served approximately 66,000 patrons. Among these patrons, there were an average of 38 persons in wheelchairs, 48 persons on crutches, and 28 persons using walkers.

NATO will be glad to share these data with the Congress.

There has been some discussion as to whether it is discriminatory to limit wheelchair seating to the front and back of a motion picture theatre auditorium as distinguished from seating in the center of the auditorium. We contend that it is not only reasonable, but it is essential from a safety standpoint that wheelchair patrons be seated near an exit.

Today the typical motion picture theatre auditorium is much smaller than it has been in the past. Auditoriums with 200 to 300 seats are typical. In such a facility, every seat offers an excellent view of the screen. Motion picture theatres do not have price differentials for preferred seating. Attending a motion picture can be distinguished from attending a play or concert where seating prices vary based on location within the auditorium.

There is no discrimination in placing wheelchair seating in the front and rear of a motion picture theatre. By contrast, in the environment of a motion picture theatre, placing a wheelchair in the center of the auditorium and away from an exit can create a significant safety hazard. In the rare event of a fire, the theatre staff is trained to quickly enter the auditorium and assist disabled individuals. If such individuals are close to an exit, the theatre employee can effectively assist the disabled patron. If the disabled patron was seated in the middle of the theatre far from an exit, theatre employees would have difficulty in getting to the disabled individual. Furthermore, other patrons of the theatre would be impeded in exiting rapidly as may be required by the situation. For these reasons, state fire marshals have uniformly indicated that seating for disabled persons should be placed near an exit and not in the middle of an auditorium.

We recommend that whatever legislation is adopted by the Congress, recognition must be given to the fact that wheelchair patrons of theatres should be seated near an exit.

The proposed legislation would not only cover wheelchair theatre patrons but also patrons with other disabilities. As we indicated before, the motion picture theatre industry is now including audio equipment for the hearing impaired in new construction. The proposed legislation does discuss the need for special equipment for the visually impaired. It is our understanding that some equipment is available for such individuals but that the equipment would only meet the needs of a small number of individuals and is extremely expensive. We would recommend that studies be undertaken to determine whether such equipment would be cost effective for use in a motion picture theatre. Unless a specific benefit can be shown without undue economic burden, we would oppose legislation that such equipment be required.

B. Existing Facilities.

Many motion picture theatres are located in the innercity, in buildings that are quite old. These locations are often of marginal profitability and have great difficulty in competing with modern theatres located in suburban shopping malls. The shift in the movie going population from the city to the suburb can be easily documented by analyzing new theatre construction. In our industry, it is unusual to find significant new theatre construction in downtown areas.

Due to the age of these innercity theatres and the marginal profitability, it is not feasible to require substantial expenditures for renovating such facilities to meet the needs of disabled individuals. We therefore recommend that any legislation that is approved by the Congress exempt existing structures from the requirements of the law. However, we think it is reasonable to include in the statute a provision that where an existing facility is substantially renovated, the plans for the renovation require adequate facilities to insure that disabled individuals can use the renovated theatre comfortably.

Various definitions have been proposed for what constitutes "substantial renovation." In certain state regulations dealing with this issue, it has been determined that a substantial renovation occurs in the event that the cost of the renovation is equal to at least 50% of the value of the building being renovated. NATO would support such a concept. We think that it is reasonable in light of existing economic realities. However, we caution that any legislation that is adopted should make it absolutely clear that it will constitute an undue burden to require that special facilities be put in any building unless it can be shown that such facilities will actually be used by a reasonable number of people in a foreseeable circumstance. Statistical data should be developed showing what type of handicapped or disabled individuals actually could visit various public accomodations including theatres. Any renovations or special facilities included in new construction should be limited to situations where it can be shown that the actual work done will accomplish a real goal that can be documented.

II. DISCRIMINATION IN EMPLOYMENT.

NATO supports legislation that would eliminate discrimination in employment on any basis whether race, religion, national origin, sex or disability. Our industry has been in the forefront of those promoting equal opportunity for all. However, we believe that it is necessary to again apply a rule of reason when evaluating specific job classifications. We would like to present three examples for consideration:

A. Motion picture theatre ticket seller.

Today's motion picture theatres are equipped with high technology computerized ticket booths. The equipment used in these booths has not been designed for persons in wheelchairs. A person in a wheelchair sitting behind a typical ticket booth counter could not reach from the wheelchair to the counter and certainly could not reach the money being proffered by the customer or return a ticket to the customer. Due to the mechanical limitations of this type of equipment and the size limitations of existing ticket booths, it is unreasonable to require that motion picture theatre owners offer this job to all disabled individuals if in fact such individuals could not physically perform the job under the structural limitations of the ticket book.

B. Food concession operator.

The food concession operator in a motion picture theatre is required to move back and forth down a walkway behind a food service counter, reach and obtain the various items selected by the customer, dispense certain items, i.e., popcorn and soft drinks, and obtain payment and make change. Certain types of disabled individuals can perform this function efficiently. Persons in wheelchairs would have obvious difficulties. NATO recommends the rule of reason be applied to this job classification and the employer be required to determine whether the disabled individual in question can physically perform the task in light of existing job conditions. If in fact the person cannot perform the tasks under existing conditions, it should not be considered discriminatory for an employer to refuse to hire such an individual for this job.

D. Projection operator.

The projection operator in a motion picture theatre must be able to move easily in and out of the projection booth and must be able to pick up heavy disks of film and lift the film and insert it onto the projection platter. This activity requires not only access to the facility but certain manual dexterity, upper body strength and reach. Projection booths generally are extremely limited in space. Persons in wheelchairs would have difficulty moving around within the confines of such booths and will probably be unable to lift the film and place it in the projection equipment. Motion picture projection booths are often designed so that one booth services multiple screens. A person in a wheelchair would have great difficulty moving from one work station to another. Thus, this job classification is not one which can be reasonably engaged in by a person in a wheelchair.

Again, NATO urges that a rule of reason be applied in evaluating whether an individual with a particular disability can perform in this job classification. It could well be that individuals with limited disabilities could perform efficiently as a projectionist. However, an individual with a severe disability such as a paraplegic, could not perform as a projectionist.

NATO believes that whatever legislation is passed clear recognition must be given to the proposition that before a finding of discrimination can be made, it must be determined whether the individual claiming discrimination is in fact capable of doing the job in question within the physical limitations that may be established by the disability and the limitations that may be established by the nature of the employer's facility.

A recent decision by the state of California not to require exhibitors to hire disabled workers supports NATO's position.

In March of 1989, California exhibitors successfully defeated a state government proprosal that would have forced them to hire persons with disabilities in projection booths, cashier's cages, and at theatre refreshment stands.

The issue was settled when the Handicapped Access Division of the State Building Standards Commission accepted the validity of exhibitor's claims that the physically disabled would be unable to perform their necessary tasks in those jobs, and that the cost of mandatory accommodation (access) would be prohibitive, and further exacerbate the burden on theatre owners.

This position, supported by NATO of California, does not indicate a lack of sympathy with or understanding of the plight of the disabled. NATO simply demonstrated that after working with the disabled over a period of three years, it is physically impossible for a person in a wheelchair to serve as a projectionist, work behind a snack bar, or handle ticket-dispensing equipment.

III. CONCLUSION

The proposed legislation continually refers to a "reasonable" standard and includes a restriction that no undue burdens shall be placed on owners of public accommodations or employers. We have provided specific examples with regard to our industry to indicate standards of "reasonableness" and "undue burden" that we think appropriate. We suggest that these examples be included in the legislative history supporting this Act.

We also recommend that when drafting regulations, the agencies in question be directed to develop specific facts to prove that the acts and practices required by the regulations will effectively meet the underlying objectives of the statute. Ultimately the increased costs required by the legislation will be paid by the public. It is senseless to require that the public pay the cost of regulatory action that does not meet its intended purposes. Use data should be developed on an industry by industry basis that will clearly show that the regulations that apply to such industry will actually result in more jobs for the disabled and increased use of public facilities by persons with such disabilities.

NATO supports the concept of elimination of all discrimination. NATO supports the concept of federal legislation to specifically eliminate discrimination based on disability. NATO believes that antidiscrimination legislation should establish general guidelines but permit sufficient latitude to enable employers, employees, state and local officials, educators and the public, to work together to promote reasonable standards to eliminate job discrimination based on disability.

We will be glad to provide any additional information requested.

Respecfully submitted,

Malcolm C. Green

Malcolm C. Green
Chairman

Prepared Statement of Robert L. Burgdorf, Jr.

My name is Robert L. Burgdorf Jr. I am currently Vice President for Project ACTION of the National Easter Seal Society. Prior to joining the National Easter Seal Society, I worked for the National Council on Disability, where I had the honor of drafting the original version of the Americans with Disabilities Act (ADA) as it was introduced last year. For me this bill represents the culmination of more than fifteen years of work as a legal advocate for the rights of citizens with disabilities. I appreciate this opportunity to appear before the Subcommittee to discuss the issue of discrimination against individuals with disabilities in public accommodations.

At the outset, let me say that as the author of last year's version of the bill I have no hesitation in heartily endorsing this year's bill. I believe the new and improved 1989 model of the ADA is fully consistent with the spirit and intent of the original proposal of the National Council on Disability that called for enactment of "a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting, clear, consistent and enforceable standards prohibiting discrimination on the basis of handicap" (Toward Independence, p. 18 (1986)). In my opinion, the revisions contained in this year's bill are well-conceived and well-drafted, and serve to fashion a bill that is as strong as, with potentially wider appeal than, the version introduced in the last Congress.

EXTENT AND EFFECTS OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS

In the first ever nationwide poll of people with disabilities conducted in 1986, the Louis Harris organization asked a number of questions regarding the social integration and activities of Americans with disabilities. The pollsters discovered that people with disabilities are an extremely isolated segment of the population. As the National Council on Disability summarized the poll's results:

> The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue.... While a decided majority of other Americans report that they are not active in religious, volunteer, and recreation groups, most persons with disabilities are not active in such groups. The extent of non-participation of individuals with disabilities in social and recreational activities is alarming.
> (Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities, p. 35 (1988))

Specific findings of the poll included the following:

- Nearly two-thirds of all disabled Americans never went to a movie in the past year. In the full adult population, only 22% said that they had not gone to a movie in the past year.
- Three-fourths of all disabled persons did not see live theater or a live music performance in the past year. Among all adults, about 4 out of 10 had not done so.
- Two-thirds of all disabled persons never went to a sports event in the past year, compared to 50% of all adults.
- Disabled people are three times more likely than are nondisabled people to never eat in restaurants. Seventeen percent of disabled people never eat in restaurants, compared to 5% of nondisabled people. Only 34% of disabled people eat at a restaurant once a week or more, compared to a 58% majority of nondisabled people.

(Louis Harris and Associates, The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream, p. 3 (1986))

Another specific finding of the poll had to do with grocery shopping and similar activities:

> Disability also has a negative impact on vital daily activities, like shopping for food. A much higher proportion of disabled persons than nondisabled persons never shop in a grocery store. Thirteen percent of disabled persons never shop in a grocery store, compared to only 2% of nondisabled persons. About 6 out of 10 disabled persons visit a grocery store at least once a week, while 90% of nondisabled adults shop for food this often.
> (Id., p. 3)

Why don't people with disabilities frequent places of public accommodation and stores as often as other Americans? The Harris poll sheds some light on the reasons for this isolation and nonparticipation by persons with disabilities in the ordinary activities of life. Two of the major reasons have to do with not feeling welcome and inaccessibility.

The preeminent reason why people with disabilities do not participate in various aspects of commercial, social, and recreation activities that are a routine part of ordinary life for most other Americans is that they do not feel that they are welcome and can participate safely. Two of the major reasons most commonly identified by the Harris poll why the activities of people with disabilities are limited are fear and self-consciousness about their disability. The Harris organization reported that "Fear is the barrier mentioned most frequently by disabled people as an important reason why their activities are limited, " with nearly six out of ten (59%) of those reporting activity limitations listing fear as an important reason (Id., p. 63). And self-consciousness about their disability was reported as an important factor by forty percent (Id., p. 64). To a disturbing degree, people with disabilities do not feel safe or welcome to attend or visit ordinary places open to the public for socializing, doing business, or engaging in recreation and other major activities in our society.

Another way in which people with disabilities are prevented from visiting social, commercial, and recreational establishments (and in which the lesson of not being welcome is underscored) is by the presence of physical barriers. Many people with mobility impairments, including in particular those who use wheelchairs, cannot get into or use a facility that has steps, narrow doorways, inaccessible bathrooms, and other architectural barriers that keep them out. People having visual and hearing impairments are often unable to make effective use or to participate safely in activities and services if the facility in which they occur has included no features for communication accessibility. According to the Harris poll, forty percent of individuals with disabilities reporting limitations on their activities say that an important reason why they are limited is inaccessibility of buildings and restrooms (Id., p. 64).

The Harris poll documents the social isolation of people with disabilities that results, in large part, from discrimination they encounter when they try to engage in the ordinary social and commercial transactions of daily life.

NEED FOR TITLE II-LIKE PROTECTION

Nearly three decades ago, four black students sat down at a lunch counter at a Woolworth's store in Greensboro, North Carolina, ordered a cup of coffee, and refused to move until they were served. Unknown to the four young men at the time, their act of courage would precipitate a series of sit-ins and other forms of civil disobedience challenging the racial segregation of lunch counters, restaurants, hotels, motels, parks, and other facilities. The segregation of such places was a principal target of civil rights protests, lawsuits, and proposals for legislative reform during the early sixties.

These efforts culminated in a major section of the Civil Rights Act of 1964 -- title II, which prohibits discrimination on the basis of race, color, religion, or national origin in places of public accommodation. Title II (42 USC 2000a) defines the phrase "place of public accommodation" to include a range of establishments that had generated serious problems of segregation. These include inns, hotels, motels, and other lodging establishments; restaurants, cafeterias, lunchrooms, lunch counters, soda fountains, and other facilities selling food for consumption on the premises; gasoline stations; and motion picture houses, theaters, concert halls, sports arenas, stadiums, and other places of exhibition or entertainment. Since 1964 it has been illegal for any of these establishments to discriminate on the basis of race, color religion, or national origin. Unfortunately, it is not unlawful today for these same establishments to exclude, segregate, mistreat, insult, or otherwise discriminate against people because of their disabilities.

People with various disabilities are turned away from restaurants because proprietors say that their presence will disturb or upset other customers. Steps, narrow doorways, curbs, and other physical barriers block people who use wheelchairs from entering many arenas, stadiums, theaters, and other public buildings. People with visual or hearing impairments find that no arrangements have been made for their attendance or effective participation.

At the height of civil rights confrontations in the early sixties, some parks and zoos were closed by entrenched authorities rather than permit these facilities to be integrated. Nearly thirty years later, people with disabilities are still having trouble gaining admission to many such establishments. Last year, the Washington Post reported that a New Jersey zookeeper refused children with down syndrome admission to his zoo because he was afraid they would upset his chimpanzees.

In 1985, I wrote an article for the Washington Post concerning the lack of accessibility at Ford's Theatre and other Washington performing arts facilities. Since that article was written, some substantial improvements have been made to improve access at Ford's. A major factor in the change for the positive was that the Ford's Theatre is subject to federal laws and regulations governing federally owned, leased, and federally assisted buildings, and a complaint of discrimination was filed on account of the inaccessibility of the theatre. In resolving the formal discrimination complaint, the National Park Service concluded that accessibility features were necessary and could be achieved without compromising the historic character of the Ford's building, and has worked diligently to have such changes implemented.

Had the Theatre not had a federal nexus, however, it would not be prohibited from discriminating against people with disabilities even though it is an important public accommodation. If such a facility were privately owned and operated, the improvements that have been made to increase accessibility would not have been required, and it could persist in discriminating, by practice and through architectural barriers, against people with disabilities. A place of public accommodation that is prohibited by federal law from discriminating against people because of their race or religion or national origin, is perfectly free to engage in blatant and invidious discrimination against people with disabilities. Indeed, under existing law, there is no federal statute that would prevent a private operator from constructing a new, totally inaccessible public accommodation.

The ADA seeks to correct this inequity. It addresses the two major ways in which discrimination keeps people with disabilities from making equal use of public accommodations. It prohibits discriminatory practices -- rules and attitudinal barriers that bar people with disabilities from participating or participating equally. And, in certain circumstances, it prohibits architectural and communication barriers that can keep people from even getting into a facility.

SCOPE OF COVERAGE OF PUBLIC ACCOMMODATIONS UNDER THE ADA

Title IV of the ADA deals with "Public Accommodations and Services Operated by Private Entities." Under the ADA a public accommodation means any privately owned establishment that is used by the general public as customers, clients, or visitors, or is a potential place of employment (Sec. 401(2)). The definition of public accommodation in the ADA is modeled after public accommodation anti-discrimination statutes in effect in some states, and incorporates notions of accessibility to the public and potential employees that are features of the Architectural Barriers Act of 1968 (42 USC 4151).

The definition of public accommodations used in the ADA is not identical to the definition used in Title II of the Civil Rights Act of 1964. Like Title II, the ADA covers hotels, motels, restaurants, cafeterias, theaters, concert halls, sports arenas, stadiums and other places of exhibition or entertainment. When the 1964 Civil Rights Act was passed, these were the public accommodations which posed problems of discrimination to racial minorities. As in Title II, the ADA focuses on those aspects of society which pose problems of discrimination; for people with disabilities, these include, in addition to those establishments covered in Title II, others such as doctors' offices, grocery and other retail stores, and parks. This reflects a realistic approach to the problems faced by disabled persons as did Title II in 1964 for other minorities. It simply makes no sense to bar discrimination against disabled people by theaters and not by parks, or by restaurants but not stores, or by places of entertainment but not in regard to such critical services as doctors' offices.

It is important to note that Title II has been interpreted to cover entities not specifically mentioned, Org. of Minority Vendors, Inc. v. Illinois Central Gulf R.R., 579 F. Supp. 574 (D.C. Ill. 1983), and that Section 1981 operated to ban many additional public accommodations from discriminating on the basis of race and national origin. The approach underlying these developments is an attempt to broaden antidiscrimination coverage to address existing discriminatory practices without being hemmed in by a narrow construction of the term "public accommodations."

Likewise, the approach taken in the definition of public accommodation in ADA is to define the term to encompass all those places in which people with disabilities have been denied or limited in their access to facilities, services, programs, and opportunities that are routinely made available to other members of the general public. Such is surely the essence of the words "public accommodations."

While the definition of public accommodations in the ADA is broad, it certainly does not include every new building in the

U.S. Private homes, apartments, condominiums, cooperatives, and other private housing facilities and residences are not included (many multifamily residences are subject to the accessibility requirements of the Fair Housing Amendments Act). Buildings owned by the federal government are not included (these are already subject to accessibility requirements under the Architectural Barriers Act and Section 504). Buildings owned by state and local governments are not within the definition of public accommodation, but most will be covered by the "public service" provisions in Title III.

Another important concept in regard to the ADA's coverage of places of public accommodation is the term "facility."
The term "facility" should be interpreted to refer to all or any portion of buildings, structures, sites, complexes, vehicles, equipment, roads, walks, parking lots, or other real or personal property or interest in such property, including the site where the building, structure, or equipment is located. This definition is based upon the definition of the term "facility" in Section 504 regulations (45 CFR 84.3(i)), and is similar to definitions of this term in UFAS (3.5) and in the ANSI standards (3.5). (UFAS and ANSI are discussed subsequently in this testimony.)

The term "facility," as defined here applies to both indoor areas and all outdoor areas where human-constructed improvements or items have been added to the natural environment. It includes buildings and other erected structures, as well as vehicles, equipment, apparatus, and parking lots, walkways, sidewalks, roadways, and passageways, plus the sites, areas, or settings in which such things are located.

FORMS OF DISCRIMINATION PROHIBITED

Subsection 402(a) of the bill establishes the general rule that makes it illegal to discriminate against an individual on the basis of disability in regard to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." Subsection 402(b) describes seven types of discriminatory acts that are prohibited; these include:

(1) discriminatory eligibility criteria;

(2) failure to make necessary reasonable modifications in rules, policies, practices, procedures, protocols, or services, unless to do so would involve a fundamental alteration of the nature of the privileges, advantages, or accommodations being provided;

(3) failure to ensure the provision of auxiliary aids and services, unless doing so would result in an undue burden;

(4) failure to remove architectural, transportation, and communication barriers in existing facilities and vehicles where such barrier removal is readily achievable (where such barrier removal is not readily achievable, alternative readily achievable steps to provide access are required);

(5) failure to incorporate, to the maximum extent feasible, accessibility into alterations of facilities or parts of facilities;

(6) failure to make new facilities constructed more than thirty months after the date of enactment of the Act accessible, except where it is structurally impracticable to do so; and

(7) failure to provide a level of transportation services for people with disabilities equivalent to that provided for the general public; and purchasing or leasing a new bus, or a vehicle that can carry more than 12 passengers which is not accessible.

The forms of discrimination listed are generally based upon existing concepts of nondiscrimination in law and regulations, particularly under Section 504 of the Rehabilitation Act of 1973. Thus, the requirements of reasonable modifications, of providing auxiliary aids and services, and of removing architectural, transportation, and communication barriers to make facilities readily accessible to and usable by individuals with disabilities, are well-established principles of disability nondiscrimination law. Likewise, limits upon nondiscrimination requirements, such as "fundamental alteration in the nature," "undue burden," "to the maximum extent feasible," and "structurally impracticable," are all drawn from existing regulatory language under Section 504, the Architectural Barriers Act of 1968, and UFAS.

An important distinction is made between providing an auxiliary aid or service and removing an architectural or communication barrier:

Removal of architectural and communication barriers are structural solutions, for example:

- audio loops (assistive listening systems in places of assembly like auditoriums to assist hearing-impaired people)
- signage (with Braille, raised letter, and/or color-contrasting features to assist visually-impaired people)
- emergency flashing lights or alarms (to assist hearing or visually-impaired people)
- permanently-installed ramps to assist mobility-impaired people

A permanently-installed public telephone which is equipped with a T.D.D. could be classified as structural, and therefore as the removal of a communication barrier.

Auxiliary aids and services are features of a program or service provided to an individual with a disability to enhance or permit participation; they address methods in which the program or service is operated, rather than how the building housing the services is erected. Providing sign language interpreters is an auxiliary service. Providing a portable T.D.D. can be an auxiliary service. Generally, a feature is a structural item (and therefore constitutes removal of an architectural or communication barrier) if it can be found in commonly-accepted accessibility standards such as ANSI and UFAS (to be described below).

ACCESSIBILITY STANDARDS UNDER THE ADA

The bill gives the Attorney General the authority to issue regulations and the Architectural and Transportation Barriers Compliance Board the obligation to establish minimum guidelines regarding accessibility. Existing, widely accepted standards, such as the ANSI standards (promulgated by the American National Standards Institute) and the UFAS (Uniform Federal Accessibility Standards) will be used as models, with necessary modification to establish standards that apply to particular types of facilities.

- ANSI Standards

ANSI is a well-recognized standards-setting organization which has promulgated codes covering many aspects of the built environment which are used in most parts of the country. The large majority of states already have some form of accessibility requirements, and ANSI's accessibility standards are the standards most-often referenced by existing local and state accessibility laws.

- UFAS

UFAS is a set of standards similar in many respects to ANSI, but which have been carefully reworked by the four principal standard-setting federal departments (HUD, GSA, DOT, and the Postal Service) for use in enforcing existing federal rules requiring non-discrimination on the basis of handicap. UFAS is particularly pertinent for standards pursuant to the ADA, because UFAS includes thorough scoping requirements which make clear exactly what standards apply in what situations. UFAS probably affords the designer the greatest possible clarity by specifying exactly what is required, and would eliminate potential confusion that could be caused by a less developed set of standards.

The ADA contemplates that the Department of Justice will issue standards, consistent with minimum guidelines developed by the ATBCB, to extrapolate upon existing UFAS requirements (including scoping) and apply them to the various types of facilities and places of public accommodation covered by the bill.

- Industry familiarity with standards

It is not foreseen that local establishments will have any difficulty in learning about the standards established pursuant to the ADA. Such accessibility requirements as those in UFAS and ANSI are already widely known and recognized by planners, architects, and builders. The building industry's organizations and associations have disseminated information and conducted training on standards affecting their members in the past and can be expected to continue to do so. Also, as a part of their rulemaking authority, appropriate federal agencies can undertake training for private entities affected by the ADA.

- Limits upon accessibility requirements

Provisions in subsection 402(b) of the ADA explicitly set limits upon the obligation of achieving full accessibility. Thus, the ADA does not require full accessibility when (1) in the case of new facilities, access would be "structurally impracticable;" (2) in the case of existing facilities, access is not "readily achievable;" or (3) in the case of altered facilities, access would be beyond the "maximum extent feasible." In such circumstances, a place of public accommodation would not be required to exceed these limits in order to achieve full accessibility. Such an agency would, however, be required to take less extensive steps, less than the limits stated in the above limits, to achieve accessibility. And even where full architectural and communication accessibility is not required, there is still a requirement of "program access," such as arranging for services or goods to be delivered at a portion of a facility that is accessible.

- Impact on state and local standards

The ADA does not establish any direct mandate for the inclusion of its minimum accessibility standards in state and local building codes and ordinances. As a practical matter, however, since entities which fail to comply with the minimum accessibility requirements of ADA may be subject to legal liability under the ADA, it is likely that state and local regulatory agencies will begin to make their requirements consistent with the accessibility provisions of the ADA. State and local governments can continue to select and/or develop their own codes, but they will probably not want their standards to fall below the minimum guidelines established by the ADA.

The ADA establishes certain minimum accessibility requirements that are necessary to avoid discriminating against people with disabilities. Entities covered by ADA will be required to comply with these federal nondiscrimination requirements regardless of the provisions of State and local laws. State and local provisions that set lesser standards of accessibility will be overridden in the sense that compliance with them will not protect entities covered by the ADA from complaints of violating the Act. State and local provisions that set equivalent or higher standards of accessibility than under the ADA would be unaffected by the ADA and would remain fully enforceable through normal state and local enforcement processes.

The ADA's approach to accessibility requirements is consistent with other kinds of federal requirements for nondiscrimination, which have sometimes established uniform federal policies that differ from existing local or state practices. For example, in the past, state laws and local ordinances traditionally contained restrictive covenants requiring leases to bar blacks, Jews, and Catholics from housing in portions of a community. Congress decided, as a matter of public policy, to undercut such state and local policies by permitting federal courts to intervene to bar discrimination in housing. As society has come to recognize and understand that severe discrimination also exists against people with disabilities, Congress has mandated various measures to bar this kind of discrimination as well.

- Prior federal regulation of accessibility

On a number of occasions, the federal government has demonstrated its recognition that protecting people with disabilities from discrimination requires regulation of the built environment. Regulations promulgated pursuant to Section 504 of the Rehabilitation Act of 1973 provided that all new buildings constructed by or for the use of a recipient of federal assistance must be readily accessible to and usable by handicapped persons. These regulations incorporate by reference standards issued by the American National Standards Institute and specify that such standards constitute compliance with the "readily accessible and usable by" standard. See 34 CFR 104.23. In 1984, the federal government published its Uniform Federal Accessibility Standards (also known as UFAS) for the design, construction, and alteration of buildings and residential structures covered by the Architectural Barriers Act, so that handicapped persons will have ready access to and use of such buildings and structures.

- Fair Housing Amendments Act precedent

When large majorities of both houses of Congress acted in 1988 to pass the Fair Housing Amendments Act, which included requirements for accessibility in all new multi-family housing, they demonstrated their recognition of the need for some kind of structural regulation in carrying out a broad nondiscrimination policy. That Act expressly directed the Secretary of HUD to encourage but not require state and local governments to issue accessibility requirements consistent with the minimum access requirements set out in the Act. The ADA continues the policy direction of that very popular legislation, and incorporates many of its provisions. The approach in the Fair Housing legislation of encouraging but not requiring state and local authorities to establish and enforce accessibility standards consistent with minimum statutory requirements for accessibility has provided a particularly useful model for the ADA.

- Readily achievable.

The standards applicable to public accommodations operated by private entities under the ADA are less, in certain circumstances, than those applicable to entities which receive federal financial assistance. Entities which receive federal financial assistance and public accommodations subject to the ADA are both required to provide program access to existing buildings. For recipients of federal financial assistance, if program access cannot be accomplished through other means, structural changes are required (34 CFR Section 104.22(b)). The only exemption is for recipients with fewer than 15 employees that provide health, welfare, or other social services. These recipients are exempted from making "significant alterations" if program access cannot be achieved in any other way (34 CFR Section 104.22(c)).

Under the ADA, existing facilities are only required to make structural changes that are "readily achievable." This requires physical access that can be achieved without extensive restructuring or burdensome expense. For example, a public accommodation which has one or two steps may be required to install a simple ramp. A public accommodation would generally not be required to provide access if there is a flight of steps which would require extensive ramping or an elevator. The agency or business would still have to take other "readily achievable" steps to provide program access. For example, a real estate agency doing business to the general public at a three story walk-up office would not be required to install an elevator to provide access to the upper floors. But the agency might be required to install a simple ramp over the one step to its entrance, and to provide its services to customers with mobility impairments in the first floor accessible offices.

- Topological problems

The ADA recognizes that sometimes accessibility poses topological problems by allowing for exceptional cases where access would be impracticable, unachievable, or infeasible. Thus, the ADA does not require full accessibility when (1) in the case of new facilities, access would be "structurally impracticable;" (2) in the case of existing facilities, access is not "readily achievable;" or (3) in the case of altered facilities, access would be beyond the "maximum extent feasible."

Such limitations will apply only in rare and unusual circumstances where unique characteristics of terrain make full accessibility unusually difficult. Such limitations for topological problems are analogous to an acknowledged limitation in the application of the accessibility requirements of the Fair Housing Amendments Act of 1988. In the House Committee Report accompanying the Act, the House Committee on the Judiciary noted

> certain natural terrain may pose unique building problems. For example, in areas which flood frequently, such as waterfronts or marshlands, housing may traditionally be built on stilts. The Committee does not intend to require that the accessibility requirements of this Act override the need to protect the physical integrity of multifamily housing that may be built on such sites.

Likewise, provisions in the existing Uniform Federal Accessibility Standards contain special requirements for alterations in cases where meeting the general standards would be impracticable or infeasible.

Delineation of the narrow circumstances in which such topological limitations can be invoked in the context of public accommodations will occur in regulations implementing the Act. In such circumstances, a place of public accommodation would not be required to exceed these limits in order to achieve full accessibility. Such an agency would, however, be required to take less extensive steps, less than the limits quoted above, to achieve accessibility. And even where full architectural accessibility is not required, there is still a requirement of "program access," such as arranging for services or goods to be delivered at a portion of a facility that is accessible.

ENVIRONMENTAL IMPACT OF ACCESSIBILITY

Pursuant to the limitations noted above, ADA would not require facilities to be made accessible if doing so would have a significant adverse impact on the environment. It is, however, a misconception to assume that making facilities accessible, even in environmentally sensitive areas, is likely to have an adverse effect on the environment. Proper planning and design, and proper construction and renovation of facilities should protect and maintain the integrity of the natural environment.

- National Park Service experience

An agency with considerable experience at providing access to people with disabilities while protecting environmental interests is the National Park Service. In implementing the requirements of Section 504 of the Rehabilitation Act of 1973, the National Park Service (NPS) has spent the last decade-and-a-half developing ways to make parks and recreation areas accessible to all persons with disabilities. At first blush, park and recreation facilities seem to pose challenging design questions, such as: How can we make the Grand Canyon, Rocky Mountains, Cape Cod National Seashore, or Hawaiian Volcanoes accessible? In fact, through the application of a few simple principles, the National Park Service has found that it is feasible to provide an effective level of accessibility at almost all of its parks and facilities without undercutting environmental integrity.

NPS has stated as one of its guiding principles that "The degree of accessibility provided will be proportionately related to the degree of man-made modifications made to the area or facility and to the significance of the facility." (Special Directive 83-3) Visitors' centers, for example, have a high degree of importance and are highly man-made, so accessibility should be optimal. In areas such as campgrounds which have some man-made modifications, it may be appropriate to only make a few campsites accessible. In certain natural areas with extreme slopes, rugged terrain, and no man-made modifications, accessibility features required will be minimal. But even in such areas, park staff ought to take steps to assist visitors with disabilities to experience, as nearly as is feasible, the type of recreation experience available at the site.

- ADA requirements

The common-sense accessibility policies of the National Park Service are consistent with the ADA. Full access is not required when (1) in the case of new facilities, access would be "structurally impracticable;" or (2) in the case of existing facilities, access is not "readily achievable;" or (3) in the case of altered facilities, access would be beyond the "maximum extent feasible."

- Program access

When full accessibility is not possible, the bill requires alternative methods of providing access. The Statue of Liberty is a good example of this requirement. When the Statue was being renovated, it was determined that it was structurally impossible to provide an elevator to the lookout area in the crown. Yet, the experience of the crown area and the view from it are one of the major experiences available to visitors at the park. To compensate for the inaccessibility of that area for persons unable to climb the stairs to the top, a full-scale model of the crown was developed and displayed in the museum at the site, so that people can enter it and get an idea of its size. A video presentation of the view from the top is also provided. Of course, such alternative methods must be used with some caution to avoid superficial, unequal solutions -- seeing a picture of a wild and scenic river is no substitute for rafting the river. People with disabilities should have the opportunity for the first-hand experience whenever possible.

- Other agencies

In addition to the National Park Service, other federal agencies such as the U.S. Forest Service, the Fish and Wildlife Service, and the U.S. Army Corps of Engineers have also had experience in developing accessible facilities. A number of states have passed legislation mandating accessibility in their park and recreation facilities. The experiences of all these agencies have demonstrated that making facilities accessible can be accomplished through means that are in harmony with the environment.

STANDARDS, GUIDELINES, AND TECHNICAL ASSISTANCE REGARDING ACCESSIBILITY OF PUBLIC ACCOMMODATIONS

A variety of standards, guidelines, technical assistance documents, and how-to guides are already available regarding access for people with disabilities to various types of public accommodations.

A. Public Accommodations Generally

- Standards

Existing accessibility standards, such as UFAS and ANSI, currently provide standards for accessibility of a wide variety of facilities. The scoping provisions of UFAS make it applicable to a whole spectrum of accommodations. Thus, hotels, motels, and boarding houses are addressed by UFAS 4.1.4(11); kindergartens and schools by UFAS 4.1.4(6); institutional uses, such as hospitals and child care facilities, by UFAS 4.1.4(9); businesses, such as banks, barber shops, etc., by UFAS 4.1.4(5); and mercantile facilities, such as markets, department stores, etc., by UFAS 4.1.4(10). A category of places of assembly are covered by UFAS 4.1.4(4) and these include a number of civic, social, recreation, and religious facilities; the list includes: amusement parks and arcades, arenas, armories, art galleries, auditoriums, auditoriums, banquet halls, bleachers, bowling alleys, carnivals, churches, clubs, community halls, courtrooms, dance halls, drive-in theaters, exhibition halls, fairs, funeral parlors, grandstands, gymnasiums, motion picture theaters, swimming pools, tennis courts, lecture halls, libraries, museums, night clubs, passenger stations, pool and billiard halls, restaurants, skating rinks, stadiums, taverns and bars, studios, and theaters.

For facilities covered by the scoping provisions, the general requirements and particular specifications of UFAS can be applied. To comply with UFAS, new construction of covered facilities will have to apply with substantive requirements and specifications regarding parking, an accessible route to the facility, an accessible entrance, usable bathrooms and water fountains, and access to the service or program and other common use areas of the facility.

For certain categories of facilities, UFAS sets out some more specific requirements. Part 5 of UFAS describes the special application of the standards to restaurants and cafeterias; Part 6 to health care facilities; Part 7 to mercantile establishments; Part 8 to libraries; and Part 9 to postal facilities. Moreover, regarding the category of places of assembly, as described above, sub-part 4.33 gives more specific guidance regarding the location of wheelchair seating locations, access to performance areas, placement and types of listening systems, and other issues pertinent to assembly areas within a facility.

- How-to Guides

In addition to formal standards such as UFAS that apply to places of public accommodation, there are a variety of technical assistance manuals and how-to guides that give nuts-and-bolts descriptions of how to achieve accessibility. The hotel and motel business has been blessed with two fine resources, the American Hotel and Motel Association's publication, Handicap Accessibility in Newly Constructed Hotels & Motels: An Interpretation of ANSI A117.1 (1986), and a book by Thomas Davies and Kim Beasley, Design for Hospitality: Planning for Accessible Hotels and Motels, published by the Paralyzed Veterans of America with assistance from the American Hotel and Motel Association. Both of these publications include schematic drawings, guidelines, and practical advice for designing and constructing accessible facilities.

In other areas of public accommodations there are similar publications. Examples include: Accessibility Guidelines for Meeting and Lodging Facilities (1981), published by the University of Arkansas in cooperation with the federal Rehabilitation Services Administration; Curb Cuts (1984), produced and published by the Eastern Paralyzed Veterans Association; Barrier-Free Meetings: A Guide for Professional Associations (1976), written By Martha Ross Redden, Wayne Fortunato-Schwandt, and Janet Welsh Brown, and published by the American Association for the Advancement of Science.

B. Parks and Recreation Facilities

There is a wide range of standards and how-to guides regarding access for people with disabilities to park and recreation facilities.

- Standards

Existing accessibility standards, UFAS and ANSI, are applicable to the majority of such facilities either directly or indirectly. Both UFAS and ANSI include standards for buildings, bathrooms, parking lots, entrances, etc. Nature centers, visitors' centers, and many other park and recreation facilities are buildings, and as such are subject to accessibility standards applicable to other buildings. Requirements regarding bathroom and parking facilities are the same. UFAS has standards for certain special uses, such as restaurants, housing, assembly areas, and mercantile. These standards can be applied to recreation facilities.

Even where existing accessibility standards do not apply directly, they may provide substantial guidance indirectly. For facilities such as fishing piers, campgrounds, and nature trails, UFAS and ANSI can lend significant wisdom. Major elements of accessible design under UFAS, including parking, accessible route, entrance and egress, bathrooms, and water fountains, can be applied or adapted to such facilities. Specifications for access to a pier, for example, can be extrapolated from UFAS simply by considering the pier as an extension of the pathway, and applying appropriate criteria for making a pathway accessible.

- **Guidelines and technical assistance manuals**

Since accessibility was required by Section 504 of the Rehabilitation Act of 1973, guidelines for federally assisted and federally conducted programs in the areas of parks and recreation have been available since the mid-1970s. For example, the Department of Housing and Urban Development published a technical assistance guide to making parks accessible in 1976. Barrier Free Site Design recommended specific technical requirements for construction of trails, campgrounds, swimming pools, etc. In 1983, the National Park Service issued a "General Statement of Policy on Accessibility for Disabled Persons" (Directive 83-3), outlining both basic principles and the application of accessibility policy to specific National Park Service operations. In 1986, the Park Service published Interpretation for Disabled Visitors in the National Park System, providing guidelines and resource information to assist park personnel in working with visitors with disabilities. The National Park Service has also produced two informative videotapes on accessibility: "Access to Parks and Recreation: Disabled People Speak" (1988), and "Access to Park and Recreation Facilities" (1989).

In 1985, the Federal Government Working Group on Access to Recreation prepared for the ATBCB a technical paper titled "Access to Outdoor Recreation Planning and Design." This publication delineates certain underlying principles in providing accessible recreation facilities, and provides specific guidelines and technical requirements regarding accessible picnic areas, campgrounds, and trails.

A variety of other documents provide how-to guidance in regard to accessibility as it applies to particular types of park and recreation activities. For example, the New Mexico Natural Resources Department has published Accessible Fishing: A Planning Handbook (1984), that provides comprehensive guidelines and technical requirements to improve access to fishing for people with disabilities. A number of other government and private agencies, such as the National Endowment for the Arts, the Smithsonian Institution, and the Disney Corporation have produced documents discussing accessibility in the context of their particular areas of interest. In 1988, Northern Cartographic published Access America: An Atlas and Guide to the National Parks for Visitors with Disabilities, which presents comprehensive accessibility information, including maps, diagrams, access ratings, lists of accessible features and facilities, information about weather and elevations, and a wealth of other information and data about 37 National Parks, along with essays about park use by individuals with disabilities and full-color photos of scenic views in the parks.

APPLICATION OF ACCESSIBILITY STANDARDS TO EXISTING BUILDINGS

The ADA provides that no individual shall be discriminated against in the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations on the basis of disability, and provides that "discriminated against" includes a failure to remove architectural and communication barriers that are structural in existing facilities, where such removal is readily achievable. If the removal is not readily achievable, the goods, services, accommodations, etc. must be provided via alternative methods. In this way, the ADA provides a reasonable standard by which existing facilities will be required to remove the barriers that can be removed without great difficulty, the sum total of which will greatly increase the architectural and communication accessibility of the existing public accommodations for people with disabilities.

The readily achievable standard is lower than the ADA's standard applicable to auxiliary aids and services, which are required unless the entity can demonstrate that provision would result in an undue burden.. Here, access is not required unless it can be achieved readily.

The "readily achievable" standard was preceded by the earlier (1988) version of the ADA which required structural barriers to removed within two years if doing so did not fundamentally alter the nature of the activity engaged in by a place of public accommodations. It was felt by the current sponsors of the ADA that it is more practical and inexpensive for the private sector to be held to a "readily achievable" standard.

- Existing Historic Buildings

If an existing historic building is not being otherwise altered or renovated, it is required to remove barriers when doing so is "readily achievable." This standard leaves considerable room for balancing the need for accessibility with maintaining the integrity of the building's historically significant features. Under existing law, providing access to historic properties has generally been found to be achievable without destroying a property's historic significance. The National Park Service has established the following policy for addressing accessibility in regard to historic buildings:

> The National Park Service will provide the highest feasible level of physical access for disabled persons to historic properties, consistent with the preservation of the properties' significant historical attributes. Access modifications for disabled persons will be designed and installed to least affect the features of a property that contribute to its significance. Some impairment of some features will be accepted in providing access. If it is determined that modifications of particular features would destroy a property's significance, however, such modifications will not be made.
> (NPS Memorandum H42 (Jan. 13, 1989)).

In summary, the Park Service notes, "The issue is not if we should make historic properties accessible but how to provide the highest level of access with the lowest level of impact." (Id.)

In cases where full access is not readily achievable, the ADA requires "alternative methods of making such .... accommodations available." The "alternative methods" requirement can generally be accomplished in historic buildings through a combination of alternative access features (ramps that are slightly steeper than code, usage of non-primary entrances, etc.) along with video presentations and other representational displays of inaccessible features of the building.

If any public service is offered in an existing historic building, the building is covered under the ADA's requirement for nondiscrimination in activities of state and local governments. Section 304 of the bill requires the Attorney General to develop standards for public services which are consistent with regulations under part 41 of title 28, Code of Federal Regulations (as in existence on January 13, 1978), applicable to recipients of Federal financial assistance under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). Therefore, the standards to be developed would be consistent with the historic building standards in the Uniform Federal Accessibility Standards (or UFAS). UFAS contains provisions that allow access to be provided to certified historic buildings in alternative ways (Sec. 4.1.7). For example, if it would impair the historic facade of a building to make the primary entrance accessible, another entrance can be made accessible.

COSTS OF ACCESSIBILITY

A. Making New Facilities Accessible

The regulatory impact statement issued in connection with the Section 504 rule by HEW in 1977 estimated that a new building could be made accessible at an additional cost of one half of one percent (.5%) of the total cost of construction (41 Fed. Reg.

20,333). Offsetting this cost, of course, is the savings to taxpayers of permitting employment for millions of persons with disabilities, by reducing public assistance payments and increasing tax revenues.

Other studies, prior and subsequent to the 1977 estimate, have supported the conclusion that accessibility costs in the construction of new buildings are extremely low. In the mid 60s the National League of Cities studied costs of access for people with disabilities for a national commission on architectural barriers; the study showed that when planned into the initial design, accessibility features usually cost less than one-half of one percent. A Syracuse University study conducted for HUD reached the same conclusion. In 1975, the General Accounting Office estimated that accessibility in a new building can be accomplished for less than one-tenth of one percent of overall costs.

Other authorities have concurred with these estimates that accessibility in a new building should not cost more than one-tenth to one-half of one percent of construction costs: ATBCB, About Barriers, p. 5 (1982); National Council on Disability, Toward Independence, Appendix, pp. F-28 & F-29 (1986); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, pp.81-82 (1983); Congressional Record, April 29, 1988 (Remarks of Representative Owens).

In 1981 the ATBCB prepared for the Office of Management and Budget a report of cost information based upon data provided by the federal accessibility standard-setting agencies. It stated:

> The Board staff reviewed cost studies and cost data compiled by states, architects, the General Accounting Office, HUD, manufacturers, and other members of the public and incorporated this information into papers which were presented to Board members and which were made a part of the public docket. Experience and research demonstrated that accessibility can be achieved at minimal cost -- usually 1/2 to 1% of the construction cost. This percentage would be even lower if total cost were considered (i.e., architectural and engineering fees, cost of land, landscaping, and the like).
> (ATBCB, "ATBCB Minimum Guidelines and Requirements -- Cost Information," Memorandum to James C. Miller III (March 20, 1981)

All of these studies and authorities agree that the costs of accessibility in new construction is very, very low.

B. Costs of Making Existing Inaccessible Buildings Accessible

The costs of alterations to render existing buildings accessible vary widely, depending upon the type and age of the building, the extent of architectural and communication barriers present, and other factors. Generally, renovations to make buildings accessible are estimated to vary between one-half to three percent of construction costs of an overall renovation or of a building's underlying value. (ATBCB, "ATBCB Minimum Guidelines and Requirements -- Cost Information," Memorandum to James C. Miller III (March 20, 1981, pp. 5 & 9; U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, p. 81 (1983); Senator Paul Simon, "Defending the Handicapped," National Journal, p. 468 (Mar. 14, 1981)).

- ADA limits on access to existing buildings

In regard to existing buildings, ADA requires the removal of existing barriers only where they are "readily achievable," or, where renovations or alterations are otherwise being undertaken, to the "maximum extent feasible." If barrier removal would exceed these modest limits, it is not required under the ADA. In many cases, however, access for people with disabilities can be significantly enhanced within the statutory limits.

- Resources and tax deduction

The question of what is readily achievable or feasible is affected by the nature of a building, overall renovation plans, and resources available. For existing buildings, a significant portion of the cost of providing access is tax deductible. Currently, private businesses can deduct up to $35,000 in access expenditures yearly from federal taxes. Section 190 of the Internal Revenue Code permits businesses to deduct up to $35,000 for costs incurred in removing architectural or transportation barriers to persons with disabilities or elderly people in any facility or public transportation vehicle owned or leased for use in a trade or business.

C. Justification for Requiring Expenditures for Accessibility

It is appropriate for government to guarantee equal opportunity for its citizens, to prohibit discrimination, and to regulate facilities in the public interest. Accessibility for people with disabilities is a legitimate public and governmental interest which is rapidly gaining recognition. Given that a significant portion of our populace has a disability or will experience one at some point, such requirements do not represent a fiscal sacrifice for a select few, but a basic insurance policy provided by our entire society on behalf of our entire society.

At this point in the development of our society, we have enough understanding of the significant life limitations posed by architectural and communications barriers on millions of our citizens, that it is folly to continue to build in such barriers. To continue to erect newly-built but inaccessible public facilities, for example, when access can be provided so cheaply, is to continue a form of discrimination that can be characterized as ignorant, at best, or, at worst, as intentional.

Rather than continue the misguided and uninformed policies of the past, we must design a public policy for the '90s and beyond that takes cognizance of the increasing age of our society, of the many groups of disabled people whose talents are needed by our culture and economy, and of the need to decrease the percentage of our citizenry surviving on benefits and entitlements because of discrimination and an inaccessible environment. We now have the opportunity to prevent significant future discrimination against a large and rapidly growing group.

- Expenses minor

A public policy of accessibility such as the one described by the ADA can generally be implemented economically. In new facilities, the cost is usually under 1/2 of 1% of the building cost. In existing facilities, the "readily achievable" standard (often requiring only such things as small ramps and grab bars) will also be inexpensive, and frequently tax-deductible, with the potential return of additional profits.

The Architectural and Transportation Barriers Compliance Board has noted that accessibility costs are very small, especially when compared with the relatively high costs of incidental routine maintenance:

> The U.S. General Accounting Office notes that in constructing a new building, accessibility features may cost less than one-tenth of one percent of overall costs. By contrast, the cost to clean and polish most office floors is about 13 cents per square foot. Thus recurring cleaning costs far exceed fixed access costs.
> (ATBCB, About Barriers, p. 5)

Even though they may entail some minor costs, access requirements are comparable to many other federally imposed obligations (such as environmental and health/safety regulations and other civil rights protections) which are levied in the public interest. In the current situation, the public interest cries out loudly for people with disabilities to be afforded the equal opportunity to participate in all facets of American society.

Thank you for your consideration of my testimony. I look forward to your deliberations, and am hopeful that you will take positive action to make the Americans with Disabilities Act of 1989 the law of the land.

Testimony for the
Americans with Disabilities Act of 1989 (ADA)
Title V: Telecommunications Relay Services

Presented before the Senate Subcommittee on the Handicapped
May 10, 1989

by
Paul L. Taylor
Associate Professor, National Technical Institute for the Deaf at
Rochester Institute of Technology, Rochester, New York

Honorable Senators, on behalf of 12,000 dues paying members of Telecommunications for the Deaf, Inc., its advocate arm, the National Center for Law and the Deaf, and some 22 million hearing impaired Americans who have varying difficulties using the telephone in the customary manner, I am happy to speak on the wonderful benefits of the new dual-party telephone relay services (DPRS) that have only recently been available to a small percentage of the hearing impaired population in a few states. Such benefits make us all realize that we are not as much hearing-impaired as we are **communication-impaired**. The communication-impaired aspect isolates us from the rest of the world. The DPRS acts as a bridge between us and the world; indeed, a vital one where employment and independence are at stake. We want to improve chances for our career mobility so that our increased payout of state and federal taxes will do us proud and make us givers rather than receivers. Our career mobility depends on our use of the telephone in our jobs. The inability to use the telephone has already cost us untold thousands of passed over promotions and job opportunities. As a result, we remain underemployed in spite of our high school diplomas and college degrees.

Many years ago rural areas of America were afforded equal accessibility to the telephone when the state utility commissions spread the cost of the expansion equally among all telephone subscribers in the state. We ask that our telephone communication barriers be removed like these geographical barriers. We also ask that costs associated with that removal be spread among all telephone subscribers.

For twenty years, volunteer or low-end clerical staffed organizations have provided some relay services, however, due to funding and staffing problems, the blockage rate (busy line occurence) was intolerably high, often on the order of twenty busy lines to one serviced line. To countermand this unacceptable condition, the New York Public Service Commission in a memorandum last year defined that its newly established DPRS shall have the same service accessibility as the regular network which is one busy line per 100 requests for assistance.

At this present time, six states have DPRS while some twenty states are either on the way or are considering setting up a DPRS. (See attached update). However, each DPRS have differing governance methods which leads to inconsistency and confusion. Five of those states operate DPRS as a result of state legislation with different funding mechanisms. The sixth operates a DPRS by a direct order from the Public Service Commission incorporating its costs in the base rate of its 41 regulated telephone companies. Other states that plan to be operational next year likewise will have differing organizational and funding mechanisms. Half of the 50 states do not have any consideration for establishing a DPRS. The net result of this inconsistency is a limitation on telephone accessibility. For instance, of the six existing DPRS, only three offer interstate services. Of the other three that offer only intrastate services, New York and California easily being the largest of all DPRS still cannot offer interstate relay services. Only one state which operates a DPRS has an official statement defining full telephone accessibility.

Funding a DPRS from tax revenues may subject it to budgetary line item vetoes thus temporizing full telephone accessibility during periods of economic inactivity. A capped telephone surcharge is undesirable for two reasons; it reflects the costs of the DPRS on the monthly telephone statements which in the eye of the public would constantly remind them in a rather invidious way that the blame for the increased cost lie with the relatively small speech and hearing impaired population; and the fixed income it provides to the DPRS may not allow for expansion to meet unforeseen demands. Without such expansion, the notion of full telephone accessibility goes back from a reality to only a concept much to everyone's disadvantage.

Data from the existing DPRS centers have indicated that the increases in the telephone bill of their state's telephone subscribers range from five to fifteen cents per month. This does not include costs associated with free distribution of telecommunication devices for the deaf (TDD) to qualified individuals in several states. To give some semblance as to the range and nature of services presently provided by DPRS, I will offer California and New York as examples. During a single month in March 1989, these two DPRS's serviced 300,000 intrastate only calls on a 24 hour, 7 day/week basis. Of these calls, 80% were originated by those with hearing/speech impairments and 20% by hearing callers. New York is presently growing at a 20 percent clip per month since its inception last January. New York which uses the base rate to pay for its DPRS has already notified its 11 million telephone subscribers of a 12 cent increase per month. This notification occured just once and not monthly as in the case against California which uses the unpopular surcharge of 0.5 % applied to intrastate toll charges.

Consistency towards organization and funding methods of DPRS is urgently needed across all 50 states to ensure that full telephone accessibility become a significant reality for the 22 million hearing and speech American citizens. Last September at the "Speech to Text" Conference as hosted by Gallaudet Research Institute at Gallaudet University, the overwhelming consensus of the experts was that full telephone accessibility is the most important consideration towards a DPRS and that such accessibility is most likely to occur if costs are incorporated into the telephone's base rate. A preamble stating that the allowable blockage rate for any DPRS being identical to the regular voice telephone network should be at the beginning of any legislative or utility regulatory document to state clearly what full telephone accessibility is about.

Initially, when a DPRS was being considered by the New York State Public Service Commission, many local telephone companies objected, fearing competitive inequities among themselves. They were informed that the costs of the DPRS are to be shared proportionally among them according to their relative sizes as defined by number of subscribers in their local area. Eventually, their objections turned into sentiments of support. The incorporation of DPRS expenses into the telephone's base rate was made possible with these sentiments. A telephone monthly surcharge accomplishes the same prevention of competitive inequities, but it is inflexible and too conspicuous on the monthly telephone statements.

Once more, I need to stress the fact that consumer participation in the establishment and operation of DPRS is of paramount importance. All utility regulatory agencies have consumer advisory committees and the DPRS is no exception. Hearing and speech impaired representatives should constitute the bulk of such advisory committees as rightfully expected.

I would like to conclude this testimony with a sincere request for full telephone accessibility for the 22 million hearing, or rather, communication-impaired Americans in their fifty States. Finally, we dare ask the honorable members of this 101st Congress that in the true spirit of full accessibility the intentions as set forth by the Communications Act of 1934 will finally realize Dr. Alexander Graham Bell's original intent of his invention as a communication tool for the hearing and speech impaired.

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EXECUTIVE DIRECTOR
Alfred Sonnenstrahl

Telephone Relay Service Update
State-By-State

(as of May 6, 1989)

One of TDI's major goals is to have all fifty states access quality dual party telephone relay (DPR) services so that all 22 million hearing and speech impaired Americans may have full telephone accessibility. Quality services are those that are adequately funded and staffed so that accessibility is not limited. Updates will be printed periodically in our GA-SK newsletter to apprise you of the current national situation. New or updated information should be sent to: Paul L. Taylor, Chairman, Telephone Relay Committee, NTID Bldg. 14, Rochester, NY 14623-0887.

A summary of current DPRS activity follows:

STATE	ACTIVITY
AL	AT&T awarded contract to begin service on 4/1/89. Legislative act authorizes monthly surcharge of 20 cents on all telephone subscribers in the state. Ms. Ruby Griffin is the new manager. Address: Alabama Relay Center, Bldg. 500, 2200 Riverchase Center, Birmingham, AL. 33 employees; 15,000 sq. ft. Rev. Cam Desmaris 205-582-5577.
AZ	DPR service began 3/13/88 by non-profit organization. Current legislation requests a cap of 0.8% of monthly phone bill to be applied towards DPR. Passed by House Ways and Means Committee 4/3. Scheduled ahead are the Rules Committee and

	the Governor's signature. Claudia Foy 602-542-3323.
AR	DPR system since 10/87 is funded thru state Rehab Services. Operated 24 hrs. by Communication Ctr. of the Health Dept. Currently working on 911 ACCESS statewide. Ken Musteen, State Coord. f/t Deaf 501-371-1922 (Voice) 1924 (TDD).
CA	Legislation signed to change funding mechanism from 10 cents surcharge per line to 0.5% surcharge on all intrastate toll charges. Currently in its third year of operation by AT&T. Handles 220,000 relay calls per month. Ms. Phyllis Shapiro, Manager. Address: California Relay Service, 20931 Burbank Blvd., Woodland Hills, CA 91367. Jack Levesque 415-895-2432.
CO	Legislation to create funding for DPR system has been proposed for second year in a row.
CT	Legislature appropriated funds for DPR which is operated by a non-profit organization.
DE	Senate Bill No. 97 introduced 3/21 to require Diamond State Telephone Co. to establish a DPR as initiated by the PSC. A. Laurence Field, Administrator, Architectural Access. Bd., State of DE 302-571-2295 TDD.
FL	DPR center proposal requested by Fla. Telephone Assoc. and Fla. Council for Hearing Impaired. Will make recommendation to the Public Service Commission and Legislature. Ms. Peggy Schmidt, Administrator, FCHI, Knott Bldg. Tallahassee, FL 32399-0401, 904-488-5087.
HI	Presentations have been made on the DPR to the Public Service Commission and other parties after legislation passed a law. Current bidders are Hawaiian Telephone and ATT. Bernadette Coughlin 808-548-3972.

IL	Public Service Commission approves statewide relay service which is scheduled to begin 6/30/90. Bidding for service parties to result in selection by 5/1/89. There is no "cap" to surcharge; it will float according to cost of TDD distribution and relay systems. Ms. Pam Ransom, Chicago Hearing Society, 312-939-6888 Voice, 312-427-2166 TDD.
KS	Public Service Commission is presently inquiring into a DPR.
LA	Legislation authorizes surcharge of 5 cents per month eff. 9/1/88. Advisory committee formed. It may link up with Alabama relay center.
MD	Legislation passed directing Dept. of Human Svcs. to establish and administer DPR services.
MI	Legislation authorizes Public Service Commission to design and implement DPR system funded by 10 cents surcharge. A committee has been formed to advise on implementation. Hearings to continue through 3/89. PSC ordered hearings and procedures which will lead to setting up the system. PSC hearings were completed in March. Michigan Bell filed for a rebuttal hearing (sched. in May) to resolve minor matters. Francine Lauer 517-373-0378.
MN	Legislation authorizes ten cents surcharge on all telephone subscribers in state. Non-profit organization provides services.
NV	Legislation has passed. Funding may not be adequate.
NM	Legislation has passed. Funding may not be adequate.
NY	DPR system implemented on 1/1/89 by AT&T in a new 20,000 sq. ft. facility in Clifton Park (north of Albany). Funded by all 42 telephone companies in NY state as a normal operating expense. Number of

	calls serviced during first month is 41,932. In third month, over 66,000 calls were serviced. Growth is expected at a 20 percent clip per month until it levels off at around 120,000 service calls per month. Paul Taylor 716-475-2243.
NC	Senate bill enacted establishing DPR program. To be administered by NC Council for the Hearing Impaired. A consultant has submitted results of a study on DPR to the Legislature.
OH	Public Service Commission issued statement of support 7/88 for relay service program. However, statement stipulates that the program should be addressed through legislation.
OK	Contract for center awarded to non-profit organization for one year. Surcharge of 5 cents applied to all telephone subscribers in state for both DPR and TDD distribution programs. Charles Estes 405-495-7707.
OR	Legislation provides for a ten cents surcharge to fund DPR and TDD distribution programs. Equipment RFP for DPR has been issued. Service provider RFP to follow.
PA	PSAD representatives have met with staff of the Penna. State Telephone Association and PUC on 4/20. Statewide relay system tentatively approved by Advisory Council. Formal action expected anytime soon for startup next year. John Maurer 412-364-5738.
TN	Public Service Commission approves a dual statewide telephone relay system. Otto Menzel 615-878-5626.
TX	Proposed legislation, entitled the Telecommunications Relay Access Service, sponsored by Senator Chet Brooks, will mandate the PUC to establish statewide telephone relay service. Larry Evans 512-469-9891.

UT	Three cents monthly surcharge enables a non-profit service provider to continue DPR services.
WA	Legislation has provided ten cents monthly surcharge for a DPR and TDD distribution program. A state directed non-profit corporation has been proposed to manage the DPR and distribution services. Patti Hughes 206-586-8249.

Direct Connect

MINNESOTA
RELAY
SERVICE

419 North Robert St., Suite 300, St. Paul, MN 55101   (612) 297-5328 Voice & TDD

Written Testimony for
the Americans with Disabilities Act of 1989
Senate Subcommittee on the Handicapped
May 10, 1989

My name is Robert Yaeger and I am the Unit Manager of the Direct Connect Minnesota Relay Service (a program of D.E.A.F. Inc.), one of the newest and the most technologically advanced of the half-dozen state-wide relay services in the country. I was previously the coordinator and one of the original operators with the Massachusetts Relay Service, the third state-wide relay service in the U.S.

I am writing in support of the Americans with Disabilities Act of 1989, specifically to address the desperate need for comprehensive intrastate and interstate, Deaf run TDD/telephone relay services across our country.

A TDD/telephone relay service provides a vital link between people, hearing and deaf, who could not otherwise communicate over the telephone. A deaf, hearing impaired or speech impaired caller who uses a TDD (Telecommunication Device for the Deaf) calls into the service and types to a Relay Operator over the operator's computer terminal. (An IBM PS2 Model 50-Z is used with an Ultratech Intelemodem as a large screen TDD and for intrastate long distance information. No record of a caller's conversation is kept on paper or disk to insure confidentiality.) The operator calls the voice user on a seperate phone line. When both parties are on line, the operator reads the deaf caller's words aloud to the hearing person and types the hearing caller's words to the deaf person. The Relay Operator is only responsible to pass the conversation from one person to the other and occasionally to translate the grammar of American Sign Language to spoken English. The operator acts as a "human telephone wire" and does not interfere with the business of the call. All calls and information are kept completely confidential.

Each day we think nothing of phoning to make a doctor's appointment, do business with a person or company in another city, state or country, chat with a friend or relative, do our banking or investing, contact a parent whose child is sick at school, make travel arrangements or just order a pizza. How many times do you pick up the phone to make or answer a call everyday? Can you imagine having to leave your home or office and physically travel to handle the business for each of those calls?

Millions of Americans are denied the freedom and convenience of this device which sits on our desk and with the touch of a button connects hearing people to the largest telecommunication system on the planet.

The need for TDD/telephone relay service has been proven in Connecticut, California, Massachusetts, Arizona New York and Minnesota. Now hundreds of thousands of calls are made each day by deaf, hearing impaired and speech impaired people who previously had to wait and depend on a hearing friend or relative (or sometimes a stranger) to make their business and personal phone calls for them. This includes numerous people who were denied jobs on the age-old pretext that "you might have to make a phone call in the course of your job so a deaf person could not handle this position." Millions of people have been denied the right to live their own lives independently because major telephone corporations didn't consider it necessary or economically feasible to take the extra steps to provide simple phone service to that segment of the population until those companies were forced to do so by legislation. Companies such as AT&T have had the technology to provide relay services for at least a decade, but their services in California, New York and Alabama only opened after legislation was passed. AT&T is currently suggesting that if the ADA passes, state tax dollars should pay for the services

It is imperative that regulations be established to insure the deaf and hearing impaired community's needs and rights are respected. These regulations should be created by the FCC, communication impaired persons and persons with experience in the relay field. To leave the quality and guidelines of a TDD/telephone relay service in the hands of a hearing-controlled corporation would be as absurd as running the National Organization for Women with an all-male board of directors.

These services are more than just telephones and computer terminals. A relay service is comprised of both telecommuncations equipment and human beings. Neither functions without the other. It's not only phone lines and fiber optics, it's about ethics, responsibility and cultural understanding.

The most successful and highly praised services in the U.S. have been those run by Deaf controlled organizations, where Relay Operators have been trained by deaf people to understand Deaf Culture and language. (Many callers type in the grammatical structure of American Sign Language, which is radically different from English.) They have been trained by professional interpreters to understand confidentiality, non-interference and the ethics and methods of facilitating communication between deaf and hearing individuals. These services were built upon and constantly accept input and feedback from the consumers they were designed to serve. The "common carriers" mentioned in the bill are phone companies with the technological capabilities but without the humanistic capabilities necessary to provide quality service.

As a former Relay Operator myself I have witnessed the difference these services can make in people's lives. Consumers have written to say the service has opened doors for them, provided a tool for independence, a means to live their own life. A woman calls an ambulance when her husband has a heart attack. Someone sets up an interview and gets their first job. A teenager gets their first date.

An adult deaf woman has the first complete, genuine conversation of her life with a father who never learned sign language.

The Americans with Disabilities Act of 1989 must be passed. The millions of deaf and hearing impaired people in this country have waited long enough for access to the communication equipment that hearing people have enjoyed all their lives.

Clearly Equal Access is every person's civil right, but until consumer controlled TDD/telephone relay services are available nationwide, the phrase Equal Access is just empty rhetoric.

Prepared Statement of Gerald A. Hines

My name is Gerald A. Hines. I am Director of Special Long Distance Services at AT&T, in whose behalf I am here today.

AT&T has a long history of providing services to persons with disabilities. It was, as you may recall, during the course of his studious efforts to help people with hearing disabilities that Alexander Graham Bell came to invent the telephone back in 1876. Over the years since then, both AT&T Bell Laboratories and Western Electric, which is now known as AT&T Technologies, have researched and developed new technologies and designed many innovative products to better serve disabled persons.

AT&T commends the Subcommittee Chairman for introducing the "Americans with Disabilities Act of 1989" and for conducting these hearings. These are important initiatives which you have begun on behalf of people with disabilities. My own expertise in this matter is in the area of telecommunications relay services, which is dealt with in Title V of this bill, and I will therefore confine my testimony to that title.

Telecommunications relay services, or Dual Party Relay (DPR) services, as we call them, provide an important and even indispensable link that enables a hearing-impaired or speech-impaired person to communicate over the telephone system with any non-handicapped person, through an attendant at a DPR center. DPR is thus very valuable for all of us, but, for the two to three million people with severe hearing or speech difficulties, it is far more vital.

AT&T has had many years of experience with DPR and now operates three DPR centers which, respectively, serve customers in California, New York and Alabama. These and a number of other states deserve credit for the major steps they have taken in this area. Nonetheless, we do not think that state action alone is enough. AT&T supports initiatives looking toward the establishment of universal DPR and believes that appropriate government authorities at both the federal and state levels must work together and with the telecommunications industry toward that objective.

DPR requires both advanced technologies and important interpersonal skills, but the concept itself is really quite simple. A person with a hearing or speech difficulty that prevents his or her using a regular telephone uses, instead, a telecommunications device for the deaf, or TDD. This teletype-like machine enables the person to transmit and receive written messages over the phone. In a state where a Dual Party Relay system is in operation, California, for example, someone using a TDD contacts the DPR center. An attendant there receives the message and then communicates it by way of an ordinary telephone call to the party the hearing-impaired person wants to reach. The messages go back and forth in this manner until the communication is completed. A call can be made in reverse order, as well, from someone placing an ordinary telephone call to a person with a disability. DPR is not needed when two persons with disabilities are communicating with TDDs; in such cases, they send their messages back and forth directly to each other.

A DPR attendant must have highly specialized training and skills. He or she must be able to understand and translate typed American Sign Language syntax into spoken English, and must have excellent typing, spelling and vocabulary skills. Attendants must be sensitive to the cultural and linguistic differences between the deaf and hearing communities and, because they transmit messages that are personal and confidential, often with respect to business, they must adhere to the highest professional standards of ethics and confidentiality. Attendants must relay whatever messages they receive accurately, without passing judgment with respect to their content, conveying communications and not in any way editing or censoring the messages.

The California Relay Service, operated by AT&T, began taking calls on January 1, 1987. Initial expectations were that the center would handle about 50,000 calls each month. Instead, the center received 87,000 calls in its first month and now regularly processes more than 250,000 calls each month. The center has 120 attendant positions and employs more than 200 communications assistants. It will handle more than 2.75 million calls this year.

So far in 1989, AT&T has been engaged by two additional states, Alabama and New York, to provide DPR service. In its first month, the New York center handled more than 45,000 calls. It now receives more than 65,000 calls monthly and volume is expected to reach 100,000 calls monthly before long. It has 100 attendant positions and employs about 100 communications assistants.

The Alabama DPR center opened February 27, 1989. Currently, some 7,000 to 8,000 calls are coming in each month and it is anticipated that the center will process more than 250,000 calls in its first year. It has 30 attendant positions. At least one other state has expressed interest in using the Birmingham center for its own DPR users.

We envision a scenario in which each state would establish a DPR center, perhaps along the lines of those in California, New York and Alabama. Each state would take bids from potential suppliers to operate the center. Some states might not have a sufficient number of calls to justify their own centers; in those cases a regional center serving several states might be more efficient. The center would apportion costs and all of the states involved would benefit from the economies.

The start-up of DPR centers in various states reflects a growing sensitivity at the state level to the needs of speech-impaired and hearing-impaired people and a growing awareness of the technology available to serve them. While I have focused on the three centers which AT&T operates, all of which were begun rather recently, DPR is not new. For some 20 years, public-spirited groups have been active in this area. Today, some 200 private organizations--churches, Catholic Charities, United Way organizations and specialized groups like the Telecommunications Exchange for the Deaf, Inc. (TEDI)--provide DPR services, which are funded by contributions and staffed by volunteers.

The contributions of these groups cannot be overstated. They have made a very significant difference in the lives of many disabled people and have pioneered the introduction of a service that will affect the lives of millions more. But the needs of speech-impaired and hearing-impaired persons greatly outstrip the resources of our nation's charitable organizations and volunteers. DPR centers need to be open 24 hours a day, seven days a week, with a sufficient number of positions, and sufficient equipment and personnel to assure that all calls receive prompt attention. People with these special needs deserve services which will bring them as close to parity with the rest of society as possible. This is a need which government at both the state and federal levels must address.

As the description of the DPR operation suggests, it is not an inexpensive service. It requires a skilled staff and up-to-date technology, and must operate around the clock, every day of the year. If it is agreed, at the state or national level, to establish DPR centers as an important and socially desirable public service, then government must recognize that funding for such centers should come from the general treasury. It would not be fair to expect any particular industry or group of customers to bear these costs alone.

In view of the need for taking advantage of all available economies of scale, one approach to a national DPR system is to build upon the state systems already in place or under way, and develop an integral system that will process local and long distance calls, intrastate and interstate. The legislation proposed by the Subcommittee Chairman correctly calls upon the

FCC to establish minimum standards and guidelines. It would assure that any DPR center that is established would provide the highest quality service that technology allows.

As noted earlier, many states have already begun to face up to their responsibilities in this area. In addition to California, New York and Alabama, four states now provide for the funding of statewide DPR centers, which are staffed by private agencies.[1] Altogether, some 15 states have adopted legislation calling for the establishment of such centers.[2] Legislation is pending in eight others.[3] Whatever Congress and the federal government can do to help expedite a national DPR system would be most welcome.

By far, the majority of states accept the responsibility for providing DPR centers for their residents. In some cases, legislatures have authorized direct public funding of the DPR service.[4] In other cases, the states have assigned the DPR operation to a public agency.[5] In all cases, the states have prescribed a funding mechanism, typically a monthly surcharge on non-competitive local-exchange lines, as a surrogate for general tax revenues.[6]

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[1] Arizona, Minnesota, Oklahoma and Utah.

[2] Alabama, Arizona, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Minnesota, North Carolina, Oklahoma, Oregon, South Dakota, Utah and Washington.

[3] Colorado, Georgia, Massachusetts, Montana, Nebraska, Tennessee, Texas and Virginia.

[4] Connecticut and possibly New Mexico.

[5] The Department of Public Service in the State of Maryland, for example, and the Department of Social Services in South Dakota. In California, Georgia, Illinois and North Carolina, the legislatures have delegated the service responsibility to public agencies which do not appear to be conventional agencies of the respective state governments.

The funding for DPR in Alabama, for example, comes from two sources. First, customers pay a charge based on the tariffed rates for a point-to-point call between the disabled and non-disabled persons. The telephone companies, however, do not keep this charge. Instead, they remit it to the committee which administers the Alabama DPR. Also, each telephone subscriber in the State of Alabama pays 20 cents per month to support the relay center.

In conclusion, let me emphasize once again that AT&T strongly supports the goal of nationwide Dual Party Relay, and will continue to work with the federal government, state governments, other companies in the telecommunications industry, private groups and associations--particularly those representing people with hearing or speech disabilities--and individuals at all levels, to accomplish this objective.

AT&T is pleased to have the opportunity to present its views on this important matter.

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[6] Surcharges per local-exchange line per month are imposed in Alabama ($0.20); Arizona ($0.03); Illinois ($0.03); Louisiana ($0.05); Minnesota ($0.10); Oklahoma ($0.05); Oregon ($0.10); South Dakota ($0.10); Utah ($0.10); and Washington ($0.10). Surcharges have been proposed in five states: Colorado ($0.10); Georgia (unspecified); Michigan ($0.10); Montana ($0.10); and Nebraska ($0.10). In many cases, the surcharge covers the cost of distributing TDD equipment as well as the cost of the DPR center. California's charges are indicated earlier in this testimony.

STATEMENT OF GREYHOUND LINES, INC. ON THE AMERICANS WITH DISABILITIES ACT

The proposed Americans with Disabilities Act (ADA) has the potential to destroy the private sector intercity bus industry and to deprive millions of people of affordable intercity public transportation and thousands of rural communities of their only link to the outside world. Greyhound is firmly committed to providing accessibility of its service to the physically disabled and has undertaken a number of programs to accomplish that. However, those programs must be consistent with our ability to maintain a strong nationwide bus system. Passage of the ADA would deprive us of that ability.

The ADA appears to require full handicapped accessibility for all intercity buses purchased more than thirty days after its passage. This would include installation of wheelchair lifts; widening of the aisles; removal of seats; loss of baggage and package express space and redesigning of bus restrooms to accommodate wheelchair users.

At present, Greyhound has a nationwide bus fleet of approximately 4,000 buses. In order to provide a cost-effective and attractive bus fleet, it is desirable to replace 10% of the bus fleet, or approximately 400 buses every year. Thus, the bus installation costs to Greyhound annually could be as high as $20 million (400 buses X $35,000 to $50,000 per bus). Greyhound simply could not afford that additional cost.

The regular route bus industry has been declining for years, and that decline led the prior managements of both Greyhound and Trailways to disinvest from the bus industry. With the merger of Greyhound and Trailways in 1987, that process was reversed. We are rebuilding and hopefully, revitalizing intercity bus service. For 1989, we have a capital budget of $28 million to buy new buses and build and upgrade terminals. This is an extraordinary commitment for a company that lost $17 million last year; yet, over 70% of our capital budget would have to be spent on wheelchair accommodations if we were to buy the desired 10% replacement fleet. Clearly, the net result of the proposed ADA requirement would be that we would stop buying buses and rebuilding terminals, and the bus revitalization effort would end.

As bad as this cost analysis appears, this is only just the beginning of the problem. To accommodate the wheelchair lifts, we would have to remove at least 4 seats. Assuming full accessibility to the restroom, as many as an additional 12 seats would have to be removed. Thus the passenger carrying capacity of our buses would be diminished by between 10%-35%. This is a critical factor since the bus business is very much of a peak period business, we must have the capacity to handle passengers at peak periods. Loss of even 10% of our capacity would deprive us of that ability. We would be required to run additional equipment to provide the peak period service at an estimated additional cost of $20 million per year.

An even more serious problem is the fact that wheelchair lifts presently being manufactured take up 32% of the capacity of the baggage and package express bins under the buses. Intercity bus service, particularly rural bus service, is viable only because we derive incremental revenue from carrying package express in our baggage bins. Last year, Greyhound derived $95 million from package express. Loss of any significant portion of this revenue would jeopardize all of our service, but particularly our rural service. It should also be noted that the loss of 40% of the baggage bin capacity falls disproportionately on package express because by law, baggage must be given priority. Since on many schedules, baggage takes up 50% or more of the present baggage bin space, there would be even less room for package express.

In addition, there is the added maintenance cost. It is difficult to estimate this with precision, but based on transit bus experience as well as other information we have obtained, we conservatively estimate $2,000.00 per bus in additional annual maintenance cost. For us, this would be another $8 million.

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To summarize, our preliminary figures on the cost of these items break down as follows:

Estimated additional cost to purchase lift equipment on a new bus--$35,000 per bus. For 400 buses annually--$14 million.

Additional cost to relocate/enlarge restroom and related adjustments--estimated to be $15,000 per bus. For 400 buses--$6 million annually. This figure is very preliminary given the lack of prototypes.

Estimated additional yearly maintenance cost--$2,000 per bus. For 4,000 buses--$8 million annually.

Cost associated with the necessity for running addtional buses over certain routes due to loss of seats on lift equipped buses--approximately $20 million annually.

Cost associated with loss of approximately 32% of baggage space causing loss of Greyhound package express revenue--up to $30 million annually.

One might ask, "Why not simply raise your prices to accommodate these added costs?" That is not possible for bus service. Our market niche is reliable, low cost transportation. Our service is extremely price sensitive in competition with the private automobile, the airlines and Amtrak. The former two modes (private autos and airlines) are specifically exempt from the ADA, and Amtrak is so highly subsidized that the effect would be largely absorbed through subsidies, rather than price increases.

In addition, in those thousands of rural communities where we are the only form of public transportation, many of our routes are already very marginal. There is no way that we could absorb all of the additional costs and maintain those marginal rural routes.

The people who would be hurt by the loss of bus service brought about by the ADA are those that truly need public transportation. A recent study performed by Robert R. Nathan Associates, Inc. found that among all modes of transportation, the bus industry serves the highest percentage of rural Americans, the elderly, the young, and those with lower incomes. It also found that over the last thirty years, intercity bus service has been the least subsidized mode of public transportation, having received .4% of Federal transportation subsidies. In 1987, for example, the per passenger subsidy to Amtrak was $33.45 while the per passenger subsidy to intercity bus service was $0.08. The study also found that largely as a result of this subsidy imbalance, intercity bus service declined precipitously over this period with more than 10,000 communities losing all bus service.

The ADA would expedite this deterioration.

There are also serious questions about the available technology for wheelchair lifts on high-decked intercity buses. Although there are a small number of prototype intercity buses with wheelchair lifts, we question whether the technology has been developed for a safe and reliable intercity bus lift. This raises serious safety and insurance issues. One needs to bear in mind that unlike transit buses, intercity buses are high-decked with the passenger's sitting over the luggage compartments. This means that the lift must be raised several feet above the ground before entering the bus. A further safety concern is presented by the wheelchair user's accessibility to the restroom on a moving bus either at 65mph on a rural interstate highway or in stop and go city traffic. Flowing from the safety concerns would be escalating insurance costs that would further add to the fiscal impossibility of complying with the ADA and maintaining viable bus service.

Notwithstanding our strong opposition to the proposed ADA, Greyhound is committed to providing maximum accessibility to the physically handicapped, consistent with maintaining the viability of our system. Actions speak louder than words, and we have taken a number of actions to enhance that accessibility, including the following:

1. Greyhound has begun a five year process of upgrading existing facilities and building new ones. All facility improvement projects include accessibility for the handicapped.

2. We have an established policy providing reduced fare for handicapped individuals and free transportation for an attendant. The attendant must be capable of assisting the handicapped individual in boarding and alighting from the bus, if such assistance is necessary. In response to complaints that the present system requires a subjective

decision on the part of a terminal employee concerning whether a person is physically disabled, Greyhound is dropping the descretionary role of the carrier supervisor and will require the handicapped person to have some type of doctor's letter, which will entitle the holder to a pass allowing for reduced fare transportation for a year.

3. Greyhound believes that current DOT regulations concerning transportation of hazardous materials by interstate carriers preclude Greyhound from transporting battery operated wheelchairs. However, because of technology changes, Greyhound has undertaken a study to determine whether there is a way to carry the chairs and batteries within the law and in a safe and efficient manner.

Greyhound sincerely believes that we are meeting, to the maximum extent feasible, the traveling needs and desires of the handicapped. If there is a sense in Congress that there is a public demand for intercity bus transportation of the handicapped beyond what is presently being provided, then perhaps a serious study of the significance of that demand and how best to meet it should be undertaken. We would be happy to participate actively in such an analysis. Based on such a study, informed decisions could be made with regard to what, if any, changes in present intercity bus service are needed; how to fund those changes; and how to make them, while preserving a viable form of low cost, intercity passenger transportation for those who need it.

Prepared Statement of the American Civil Liberties Union

Mr. Chairman,

The American Civil Liberties Union (ACLU) is pleased to submit testimony in support of S. 933, the Americans with Disabilities Act of 1989 (ADA). The ACLU is a national, non-partisan organization with over 275,000 members dedicated to the protection and defense of civil rights and civil liberties of all individuals.

The ACLU has a long-standing policy in favor of strong anti-discrimination protection for people with disabilities. We believe that every individual must be judged on his or her merits, without regard to characteristics that are irrelevant to a person's ability or worth.

For many years, irrelevant characteristics such as race, gender, religion, and national origin were used to judge individuals and to justify discriminatory actions against such individuals. Since passage of the landmark Civil Rights Acts of 1964 and 1968, a clear and consistent federal policy and federal prohibition against such discrimination has been in place. While the presence of the Civil Rights Acts has not been able to eradicate discrimination in our country on the basis of race, religion, national origin or sex, it has at least provided a source of redress in our nation's courts for those who have experienced such discrimination.

There are some members of our society, however, who still do not have access to this basic form of redress for unjustified discrimination. People with disabilities constitute such a class.[1] While a private employer could not refuse to hire or promote a person because that individual were black, Jewish or a woman, that same private employer, if it did not receive federal funds or federal contracts, could discriminate against a person with a disability on the basis of the disability. Such discrimination happens all too often, in situations where the person with the disability is otherwise completely qualified to perform the job in question and where the discrimination is simply the result of fear, ignorance or misperception.

The same type of discrimination that occurs in employment occurs across all spectrums of our society. People with disabilities face discrimination in a wide array of privately operated public accommodations. In some situations, the discrimination is attitudinal: a restaurant, a dress shop, an exercise club, a movie theatre or some other service provider may simply not want to provide services to a person with epilepsy, cerebral palsy, AIDS or any other disability. In other situations, the public accommodation needs to provide a simple auxiliary aid to allow a person with a disability access to a particular service or benefit, but the aid is not provided. Finally, in many situations, the discrimination is one of physical access: individuals with mobility impairments often cannot even get into the door of a building that is a public accommodation.

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[1] Another group of individuals who do not yet have recourse under federal law are those who suffer discrimination based on sexual orientation. While the ADA does not offer any protection to those who are discriminated against solely on the basis of sexual orientation, the ACLU strongly supports passage of a federal law that would offer such protection.

Problems with attitudinal discrimination and physical access exist in the sphere of public and private transportation as well. In order for people with disabilities to get to employment positions or to public accommodations, they must be able to have access to effective transportation. Yet, many publicly-financed transportation systems have few lift-equipped buses that are accessible to people with mobility impairments, and the supplementary "paratransit" systems that are available to people with disabilities have severe limitations. Privately owned transportation systems offer even fewer accessible vehicles.

People with hearing impairments experience a particular form of discrimination in our society. The basis of our society is communication -- often communication that takes place through use of the telephone. We use the telephone to carry out our business, to set up appointments, to call for help, and to order food and theatre reservations. People with hearing impairments do not have access to this most basic tool of communication if the entity on the receiving end does not have a Telecommunication Device for the Deaf (TDD) or if a telecommunications relay system is not in place in that particular geographic area.

The Americans with Disabilities Act offers the means to redress these various forms of discrimination. The bill is a historic piece of legislation that will finally extend to people with disabilities the legal right to equal opportunity and equal access in all spheres of society.

In prohibiting these various forms of discrimination, the ADA properly draws upon the long-standing experience that has been gained through application of Sections 501, 503 and 504 of the Rehabilitation Act of 1973, which prohibit discrimination against people with disabilities by the federal government, federal contractors and those that receive federal financial assistance. The regulations and case law that have been developed under these statutory provisions constitute a basic, workable scheme that has been incorporated in large part by the Americans with Disabilities Act.2/

In determining who may gain access to the protections of the

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2. The Rehabilitation Act of 1973 has provided important protections over the years to people with disabilities. However, that Act is limited in the scope of entities that it covers: the federal government, federal contractors, and those who receive federal funds. The ADA will fill an important gap by extending anti-discrimination protection to the private sector.

ADA, the bill adopts the same definition of "disability" that is used under Section 504 of the Rehabilitation Act to define "handicap." Thus, the same broad three-pronged definition of handicap that has been in place for years under Section 504 is incorporated by the ADA.[3] The scope of this coverage was recently explicated by the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). The Court noted that Congress intended to prohibit the range of discriminatory actions that result from myths, stereotypes and fears concerning people with disabilities.

The various sections of the ADA reflect the types of discrimination that are directed against people with disabilities. Title II of the bill prohibits discrimination by private employers who employ more than 15 employees.[4] The

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3. The ADA uses the term "disability" rather than "handicap," to reflect the term of choice of the disability community. However, the definition used is precisely the definition used under the Rehabilitation Act. Thus, while the defining term has been changed in order to reflect changing and more appropriate terminology ("disability" rather than "handicap"), the substantive definition has not been changed. From a legal standpoint, therefore, the breadth of coverage available under the Rehabilitation Act is the same as that available under the ADA, when that coverage depends on the definition of "disability" or "handicap."

4. Discrimination against people with disabilities obviously also occurs on the part of entities that employ less than 15 employees. However, Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, religion, national origin and sex, currently incorporates an exemption for entities that employ less than 15 employees. The ADA carries over the same exemption for discrimination on the basis of disability. The ACLU believes that all employers should be

section properly reflects the importance of reasonable accommodation in the employment of people with disabilities by requiring employers to make reasonable accommodations to the known physical or mental limitations of an applicant or employee, as well as prohibiting employers from denying employment opportunities to a person with a disability if the reason for the denial is the person's need for a reasonable accommodation. The provision of reasonable accommodations is critical in the employment sector: a person with a disability may be completely qualified to perform the essential functions of a job as long as some accommodation is made for the individual.

In deference to the needs of employers, the ADA also incorporates the protective framework of Section 504 with regard to reasonable accommodation. An entity need not provide a reasonable accommodation if it can demonstrate that provision of the accommodation would impose an undue hardship on the operation of the business. The term "undue hardship" is a long-standing term of art under Section 504 regulations and case law. A determination as to whether a reasonable accommodation would impose an undue hardship depends on well-established factors, including the nature and type of the operation, the number of employees, and the nature and type of the accommodation

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covered by the anti-discrimination mandate.

requested. See 45 C.F.R. §84.12 (1987).[5]

Title III of the ADA covers the provision of public services by a State, agency, or political subdivision of a State. Currently, the activities of most States would be covered under Section 504 if the State received any federal funds in those programs or activities, as that term is defined in the Civil Rights Restoration Act of 1987. However, to the extent that some State or local activities are not currently covered under Section 504, Title III extends that coverage to the remaining programs. As a reflection of the equivalent coverage, section 302 of the ADA incorporates the basic language of the original Section 504 provision.

Title III also incorporates specific provisions regarding public transportation. These provisions reflect a focus on the future of public transportation, by requiring that all new buses that are purchased be accessible to and usable by people with disabilities, including people who use wheelchairs. This provision is critical to the bill. A mark of a truly integrated society is one in which the mainline systems of that society are open and accessible to all.

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5. The determination whether an accommodation is "reasonable" focuses on whether it will achieve the objective of allowing the employee to perform the essential functions of the job. By contrast, the requirement that the accommodation not pose an "undue hardship" focuses on the burden on the employer in providing the accommodation.

Title IV of the ADA prohibits discrimination on the part of all public accommodations and services operated by private entities. The bill provides that no individual shall be discriminated against in the full and equal enjoyment of benefits or services provided by a public accommodation. This title incorporates the two aspects of discrimination that can occur in public accommodations, as discussed above. First, the title prohibits the attitudinal discrimination that can occur against people with disabilities in the range of public accommodations. Second, the title requires non-discrimination in terms of physical accessibility. As with the requirements regarding transportation, this title looks primarily to the future. While some modifications are required in existing facilities if such modifications are "readily achievable," the bill basically requires that construction of all new or remodeled buildings be fully accessible to people with disabilities. This approach of looking to the future is similar to that adopted in the Fair Housing Amendments Act of 1988 -- a bill which was actively supported by the ACLU and which was recently passed by the 100th Congress.

Title IV includes a definition of "public accommodation" which is different from that which appears in Title II of the Civil Rights Act of 1964. The new definition of the ADA appropriately addresses the kinds of discrimination faced by people with disabilities.[6] Title II of the Civil Rights Act defines public accommodations to include establishments which provide lodging, establishments which are engaged in selling food, and places of entertainment.[7] These are the places which presented the most significant problems of racial segregation during the period in which the Civil Rights Act of 1964 was passed and therefore these were the places on which that law specifically focused. By contrast, people with disabilities face discrimination in a range of other public accommodations--in supermarkets, barber shops, laundrymats, and in other service providers. It makes no sense to restrict the range of coverage of public accommodations to a definition that was developed at a different time, for a different purpose. Certainly, if we wish to build a truly accessible country in the future by requiring that all new buildings be constructed in an accessible fashion, it makes no sense to restrict artificially the definition of those buildings that should be covered.[8]

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[6] The ADA defines public accommodations as privately operated establishments that "are by used the general public as customers, clients or visitors or that are "potential place of employment," and whose operations affect commerce. Section 401(2).

[7] The following types of establishments are covered by Title II: "Any inn, hotel, motel, or other establishment which provides lodging to transient guest..." 42 U.S.C. § 2000a (b) (1); "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises..." 42 U.S.C. § 2000a (b) (2); "any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment..." 42 U.S.C. § 2000a (b) (3).

Title V of the ADA requires common carriers to provide telecommunication relay services. The provision of such services will be a significant step forward in communications for deaf individuals. The relay system will allow such individuals, who have access to their own telecommunication devices for the deaf, to communicate with others who do not own and use such devices. The provision of such services is an important first step forward in meeting the communication needs of deaf individuals.

Finally, the bill includes well-established provisions with regard to remedies for discrimination. The basic components of an effective remedy system are the availability of a private right of action, access to injunctive relief and damages, and availability of jury trials. These are elements that are

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8. It should also be noted that individuals who have been discriminated against on the basis of race or ethnicity have legal recourse under 42 U.S.C. § 1981, as well as recourse under Title II of the Civil Rights Act of 1964. Section 1981 prohibits any discrimination on the basis of race or ethnicity in the making of a contract. See 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."); Saint Francis College v. Al-Khazraji, 95 L. Ed. 2d 582 (1987). Thus, much of what is covered under the ADA's definition of a public accommodation would also be covered under Section 1981. See, e.g., Runyon v. McCrary, 427 U.S. 160 (1976) (prohibits private, commercially operated, nonsectarian schools from excluding children because of race); Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974) (protects right to use public streets); Hernandez v. Erlenbusch, 368 F.Supp. 752 (D. Or. 1973) (protects right to speak Spanish in a bar).

availability of jury trials. These are elements that are available to other minorities under the combination of various other civil rights statutes that currently exist. The ADA appropriately incorporates these elements.

In an Appendix to this testimony, we are attaching two other documents. First, three years ago, the ACLU established an AIDS Project which litigates on behalf of people with AIDS and HIV infection, using the currently existing federal and state disability statutes. The attached document sets forth the state of the law with regard to HIV disease under Section 504. The same principles would apply under the ADA. Second, the ACLU has prepared a memorandum responding to some of the constitutional concerns raised by the Association of Christian Schools International in its testimony before the Committee. We hope this memorandum will be useful to you in dealing with the concerns raised.

In conclusion, we would like to reiterate our strong support for the Americans with Disabilities Act of 1989. We look forward to working with you closely as you pass this historic piece of civil rights legislation.

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To: Senator Tom Harkin

From: American Civil Liberties Union

Re: Americans With Disabilities Act of 1989: Senate Bill 933. Response to Testimony of William Bentley Ball, Association of Christian Schools International.

DATE: May 29, 1989

The Association of Christian Schools International (ACSI) objects to the inclusion of religious organizations under the Americans with Disabilities Act of 1989 (ADA). ACSI argues that subjecting religious schools to the prohibition on discrimination against disabled persons will place both financial and moral burdens on religious organizations, thus violating the Free Exercise Clause of the U.S. Constitution.1/ ACSI therefore seeks a blanket exemption for all religious institutions from the provisions of the ADA.

Based on our legal research in this area, we do not believe that the Constitution requires that religious schools be granted

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend I.

such a sweeping exemption. Under current law, there is no reason why religious schools should not be required to comply with the requirements of the ADA insofar as such requirements do not impermissibly burden religious organizations' ability to practice their religion. As discussed below, Section 101 (b) (1) of the ADA would allow a religious entity to defend a charge of discrimination by asserting that the applicant failed to satisfy a qualification standard which was necessary and substantially related to the ability of the individual to participate in the covered program, activity, job, or other opportunity. Thus, if a religious faith group had among its religious tenets that persons with a certain disability could not be employed by the religious group, could not participate in or attend services of that faith group, or could not enter the religious facility as a visitor, that tenet would constitute such a qualification standard. The defense embodied in section 101 (b) (1) applies to all titles of the ADA, including both employment and public accommodations. Moreover, as discussed below, the financial impact of both the new construction requirement and the reasonable accommodation requirement of the ADA will not be substantial for religious entities.2/

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2. This testimony does not address the question whether it would be constitutional under the Establishment Clause of the First Amendment for Congress to grant a blanket exemption for all religious entities if it chose to do so. This memo addresses solely the question whether the ADA, as currently constituted, infringes on the Free Exercise right of religious institutions, as that right has been interpreted by the Supreme Court.

1. Financial Burden

ACSI argues that many religious schools lack the financial means to comply with the ADA's potential requirements. They contend that forced compliance with the ADA's requirements of provision of auxiliary aids and services, and removal of architectural barriers, constitutes constitutionally barred "unreasonable, harmful regulation of religious life and activity" which will result in many smaller religious schools closing their doors. Testimony of William Bentley Ball before Senate Committee on Labor and Human Resources Subcommittee on the Handicapped, May 10, 1989, pp. 6-8.

ACSI's arguments are not constitutionally sound. First, it is clear that the Constitution does not preclude all contact between the government and religious organizations. Some relationship between government and religious organizations is inevitable. See Zorach v. Clauson, 343 U.S. 306 (1952), Sherbert v. Verner 374 U.S. 398 (1963). Judicial prohibitions against entanglement recognize that the line of separation is a variable barrier depending on the circumstances of a particular relationship. Lemon v. Kurtzman, 403 US 602, 614 (1973). The Constitution does not preclude regulation of the activities of religious organizations unless the regulation infringes the actual exercise or dissemination of religious beliefs. See Follett v. McCormick, 321 U.S. 573, 577-78 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 112-13 (1943); Cox v. New Hampshire, 312 U.S. 569, 578 (1941). For example, fire inspections and building and zoning laws represent necessary and permissible contacts between the state and religious groups because they do not infringe on the actual exercise of religious beliefs.

By requiring religious schools to remove structural barriers and to provide auxiliary aids and reasonable accommodations for disabled individuals, the ADA does not infringe upon ACSI schools' ability to practice or teach their religious tenets and, therefore, does not place an impermissible burden on the schools. ACSI's arguments appear to based on the idea that a financial burden makes it more difficult for a religious group to carry out its activities and thus to practice its religion. Such a burden, ACSI argues, is constitutionally impermissible. The flaw in this argument, however, is that as currently constituted, the ADA does not impose such a significant financial burden on religious organizations.

Section 402 (4)(A) of the bill requires that an existing public accommodation remove architectural and communication barriers that are structural in nature "where such removal is readily achievable." Contrary to ACSI's interpretation, this language indicates that a school demonstrating that it is financially unable to alter its existing structure to comply with ADA requirements would be exempt from making such changes. Indeed, the phrase "readily achievable" is clearly intended to be a standard that takes into account financial costs and does not require extensive modifications of existing buildings that would be unduly expensive.[3] Only in the case of new facilities does the ADA require that the facility be completely accessible to and usable by people with disabilities. Nor will this requirement impose an undue financial hardship. Current data indicates that the cost of making a building accessible from the design stage is one-half of one percent of the total cost of construction.

The same accommodation to financial concerns is apparent in other sections of the bill. For example, Section 202(b)(1) requires that an employer provide a reasonable accommodation to a disabled employee only if such provision would not constitute an "undue hardship." Under Section 504 of the Rehabilitation Act of 1973, on which this provision is patterned, the standard of "undue hardship" takes into account the size and nature of the employer, the number of employees, and the type and cost of accommodation requested. Similarly, a school need not provide auxiliary aids and services if such provision would constitute an "undue burden." Section 402 (b)(3).

Cases finding an impermissible burden on the practice of religion can be distinguished from the present case. In Walz v. Tax Commission, 397 U.S. 664 (1970), the Court upheld a tax

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3. The language of section 402(4)(A) clearly does not rely on structural feasibility, but rather is designed to take into account financial feasibility in consideration of what is "readily achievable." This becomes clear when section 420(4)(A) is contrasted with section 402(6). The latter section requires that all new facilities be readily accessible to and usable by individuals with disabilities, except where "structurally impracticable." Thus, only in the case of new facilities constructed for first occupancy later than 30 months after the date of enactment of the ADA, does the ADA restrict defenses for compliance to structural feasibility.

exemption for religious organizations, against an Establishment Clause challenge, because it concluded that a state could legitimately determine that imposition of a property tax would have involved excessive entanglement and a severe financial burden on religious groups. Elimination of a tax exemption would give rise to tax foreclosures and liens and would bear unequally on different churches. The Court noted that the state granting the exemption had determined that religious institutions might be inhibited in their activities by property taxation or by the hazard of loss of those properties for nonpayment of taxes. As noted above, the ADA requirements would not similarly burden religious activities.[4]

2. Burden on Moral Teachings

ACSI argues that the ADA requires a religious school to hire a drug abuser or alcoholic or homosexual with AIDS unless, under section 101(c)(a), he or she poses a direct threat to property or the safety of others in the workplace. Requiring non-discrimination against such persons in ACSI schools , ACSI argues, imposes governmental requirements which intrude upon the self-governance rights of religious entities.

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[4] Walz can also be distinguished on the grounds that in upholding the exemption, the Court relied heavily on the almost 200 year tradition of religious tax exemptions, a case-specific justification which should not govern the decision to grant an exemption to the ADA. In addition, Walz concerned the legitimacy of an exemption under the Establishment Clause. As explained in note 5, infra, what is required by the Free Exercise Clause is not coextensive with what is allowed under the Establishment Clause.

ACSI misconceives the requirements and defenses set forth in the ADA. Section 101(b)(1) of the ADA allows a religious entity to defend a charge of discrimination if the disabled individual in question fails to meet an application of a qualification standard that is both necessary and substantially related to the individual's ability to perform the job. While section 101(b)(2)(a) establishes as a permissible qualification standard, that a drug user or individual with a currently contagious disease or infection not pose a direct threat to property, health or safety, this language is only an example of a permissible standard; the ADA does not limit the general defense to this standard. Under section 101, ACSI schools could successfully defend a charge of discrimination if they demonstrated that a drug user or an individual with AIDS had failed to meet the school's qualification standards--e.g., failing to conform to the religious tenets required of religious school faculty. Thus, an ACSI school would not be forced to hire an individual who does not conform to the religious tenets required as qualifications for the job.5/

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5. It should also be noted that if an ASCI school discriminated against a person solely because of that individual's current or past sexual activity, regardless of whether that person also has AIDS, such action that would not constitute discrimination on the basis of disability prohibited by the ADA. The ADA does not prohibit discrimination solely on the basis of sexual orientation or sexual activity.

3. Government Entanglement in Religious Schools

ACSI argues that by requiring job-restructuring, part-time or modified work schedules or adoption or modification of procedures, as aspects of the reasonable accommodation required by the ADA, the bill requires that government become excessively entangled in the affairs of religious organizations.

Walz v. Tax Commission held that government interference with religious activities is unconstitutional if it involves excessive entanglement of the state in religious affairs. Lemon v. Kurtzman held that to determine whether involvement is excessive, the Court must examine the character and purpose of the institution and the resulting relationship between the government and the religious authority. Thus, not all government involvement with religious organizations is "excessive." Cases which have found the degree of involvement impermissible have involved government creation of specific standards by which religious organizations had to function. In Aguilar v. Felton, 105 S.Ct. 3232 (1985), the Court held that a supervisory system evaluating the existence of religious content in classes for educationally deprived children held in religious school classrooms involved excessive entanglement.[6] The regulations in

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[6] In Forest Hills Early Learning Center v. Jackson, 846 F.2d 260 (1988) the Fourth Circuit Court of Appeals upheld a Virginia exemption for church-run child-care centers from licensing regulations concerning programs, nutrition, disciplinary practices, and parental participation. The court found such regulations to involve a significant burden on religious organizations. Forest Hills teaches that a state may, consistent with the Establishment Clause, decide to allow an exemption for religious schools from state regulation. However,

Aguilar however, were far more intrusive into the actual administration of religious organizations than the ADA requirements for reasonable accommodation and provision of auxiliary aids. The ADA does not provide specific guidelines for the implementation of its policies, but simply requires that employers accommodate the needs of disabled persons in a fashion that will be effective. The manner in which religious organizations meet these needs is left up to the organizations themselves.

4. Analogy to Title VII of the Civil Rights Act of 1964

Under Title VII, religious schools are prohibited from discriminating on the basis of an individual's race, color, religion, sex or national origin. The ADA expands this prohibition to preclude discrimination on the basis of a disability. In order to avoid the excessive entanglement by the state in religious affairs precluded by cases such as Lemon, Title VII exempts religious entities with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of their activities Equal

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as both Forest Hills and Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos, 107 S.Ct. 2862 (1987) emphasize, it is well established that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. What is required by the Free Exercise Clause is not equivalent to what is allowed under the Establishment Clause. Certainly, prevention of discrimination against disabled persons is a more compelling state interest justifying state involvement than requirements for licensing such as those at issue in Forest Hills.

Employment Opportunity Commission v. Mississippi College, 626 F.2d 477 (1980).

The Supreme Court has recently held that this religious exemption is constitutional, even as applied to the secular, non-profit activities of religious organizations, because it represents a permissible legislative purpose of alleviating governmental interference with the ability of religious organizations to define and carry out their religious missions. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos, 107 S.Ct. 2862.(1987) Thus, a religious organization can refuse to hire an employee performing non-religious functions, such as a janitor, on the basis of the individual's religion.

The exemption, however, does not permit a religious organization to discriminate against its employees on the basis of race, sex or national origin; it only allows such an organization to discriminate on the basis of religion. EEOC v. Southwestern Baptist Theological Seminary. 485 F.Supp 255 (1980). Thus while religious organizations may make hiring decisions based upon religious preferences, they may not, under Title VII, hire or refuse to hire on the basis of race, sex or national origin. Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (1985).

Under the ADA, therefore, religious organizations should not be entitled to a blanket exemption from liability for discrimination on the basis of disability. On the contrary, religious entities should be entitled to only the same exemption they receive under Title VII--i.e., they may make hiring decisions on the basis of religion. Therefore, an ACSI school should be permitted to object, on sincerely held religious grounds, to the hiring of a particular disabled person, but should not be exempt from the general ADA prohibition on discrimination against disabled persons.

As discussed above, this particular exemption is already incorporated into the ADA's basic structure. As noted, Section 101(b) the ADA allows employers to formulate qualification standards pertaining to an individual's ability to perform the job in question. In the case of religious schools, this would include a qualification standard that the faculty, students and staff must be able to conform to the religious tenets of the school.

Overview of AIDS and HIV Case Law

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I. Introduction

There are currently two federal laws that provide non-discrimination protection for people with disabilities. Sections 501, 503, and 504 of the Rehabilitation Act of 1973 protect all people with disabilities, including people with HIV disease,[1] from discrimination on the part of the federal government, federal contractors, and those entities that receive federal funds. This law has been successfully used to order children with HIV disease back into schools, to reinstate employees into jobs, to challenge the exclusion of individuals from various health care services, and to resist demands for individuals to undergo mandatory HIV antibody testing.

The Fair Housing Amendments Act, passed during the last Congress, extends non-discrimination protection for people with disabilities, for the first time, into the private sector. Under this law, private landlords and owners are prohibited from discriminating against people with HIV disease in the sale or rental of dwellings. This prohibition would apply to both individual transactions and to those regarding residential homes.[2]

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[1] Wherever feasible, this paper utilizes the term "HIV disease," rather than referring to the traditional categories of AIDS, AIDS-Related Complex or ARC, and (asymptomatic) HIV-infection. HIV disease is a single term which encompasses the spectrum of manifestations of HIV-related illness, both asymptomatic HIV disease and symptomatic HIV disease, from HIV infection through what has been known as AIDS. The medical community has moved toward this frame of reference and away from the clumsy traditional definitions.

[2] Thus, federal disability law presently protects handicapped individuals in federally funded employment (which includes nearly all public employment) and federally funded programs (which includes nearly all schools, prisons, and health care providers) and in the public and private housing market. The major gap in federal law is with respect to private employment and public accommodations. S.933, the Americans with Disabilities Act (ADA), would fill the existing gaps in federal law by prohibiting discrimination in the private sector. The ACLU strongly supports passage of the ADA.

II. Section 504 of the Rehabilitation Act of 1973

A. Coverage

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides the basic non-discrimination protection for people with disabilities. The brief provision (the relevant portion is no more than 37 words) establishes that:

> "No otherwise qualified individual with handicaps ... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ..."

Ibid.

The term "handicap" includes a wide range of impairments -- mobility, vision and hearing impairments, all types of physical diseases, drug and alcohol addiction, and mental impairments. The defining term for a handicap is simply a "physical or mental impairment" that "substantially limits one or more ... major life activities," 29 U.S.C. § 706(8)(B), such as walking, breathing, learning or working. 45 C.F.R. § 84.3(j)(2)(i) (1987). The term also includes someone with a record of such an impairment and someone who is perceived as having such an impairment. 29 U.S.C. § 706(8)(B).

The fact that an individual has a handicap establishes the basic coverage for that person under Section 504. In each case, however, the person must also be "otherwise qualified" for the particular position, service or benefit involved. See 29 U.S.C. § 794. This means that the person, in spite of his or her handicap, meets all of the routine requirements of the program or position in question. If a reasonable accommodation would enable the person to meet those requirements, the employer or other grantee of federal funds has an affirmative duty to make that accommodation. 45 C.F.R. § 84.3(k)(1) (1987). Under current regulations and case law, an accommodation is not reasonable if it would impose an "undue hardship" on the recipient. See 45 C.F.R. § 84.12 (1987) (listing factors to consider in determining whether accommodation would cause undue hardship).

B. Basic Principles Regarding HIV Disease

Recent caselaw has settled a number of issues regarding the coverage of HIV disease under Section 504:

1. Contagious diseases are covered under Section 504.

As noted above, the definition of "handicap" in the statute refers generally to "physical or mental impairments." The law makes no distinction between contagious and non-contagious impairments. As early as 1979, a court of appeals had held that children who were carriers of the hepatitis B virus were covered under Section 504, with not even a comment that the contagious nature of their impairment might remove them from initial coverage. See New York State Association for Retarded Children v. Carey, 612 F.2d 644 (2nd Cir. 1979).

The first and only statement to the contrary came from a federal district court in Florida, in the case of Gene Arline, a teacher with tuberculosis who was fired because the school board was afraid that she might be contagious. The trial judge in that case stated that he could not "conceive that Congress intended contagious diseases to be included" among the handicaps covered under Section 504. The court of appeals in the case, and ultimately the Supreme Court, disagreed. School Board of Nassau County v. Arline, 480 U.S. 273 (1987). With little discussion or difficulty, the Supreme Court concluded (as indeed even the school board had by then conceded) that a contagious disease could, indeed, constitute a handicap under Section 504 under the basic definition of handicap in the law. Id. at 280-86.

The Supreme Court went on to explain why it was not at all inconceivable for Congress to cover contagious diseases: while Congress might have been aware that a person with a contagious disease could pose health concerns in certain situations, it had already addressed that concern within the framework of Section 504. Under the law, all individuals with handicaps were required to be "otherwise qualified" for the position or benefit they sought. In the case of a person with a contagious disease, the person would not be otherwise qualified if he or she "poses a significant risk of communicating an infectious disease to others in the workplace" and "if reasonable accommodation will not eliminate that risk." Id. at 287 n.16. In the case of HIV disease, the consensus of medical opinion establishes that there are almost no circumstances in which such a significant risk would exist.

2. Discrimination based on fear of contagiousness is covered under Section 504.

The question litigated before the Supreme Court in the Arline case was whether an employer could discriminate against an individual based on fear of contagiousness of the individual's impairment, as opposed to discrimination based on the actual physical effects of the impairment. The Supreme Court held that a grantee under Section 504 could not discriminate on the basis of fear of contagiousness. The Court noted that it did not agree that the "contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant."

Id. at 282. Thus, Section 504 prohibits discrimination based on a fear of contagiousness because "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." Ibid.

The Court's ruling was particularly significant for people with HIV disease. Under the analysis put forward by the school board, and by the U.S. Department of Justice at the time, an employer could not discriminate against a person with HIV disease if the discrimination were based on the disabling effects of the disease, but an employer could discriminate against the person if the discrimination were based on the fear that the person could transmit the disease to others. The Justice Department emphasized that such discrimination was not prohibited regardless of how irrational or unreasonable the fear of contagion might be. The Arline decision effectively eliminated the approach advocated by the Justice Department. Under the Court's opinion, a person with a contagious disease could not be discriminated against--either because of the disabling effects of the disease or because of a fear of contagiousness.

3. All stages of HIV disease, including asymptomatic infection, are covered under Section 504.

The Court in Arline had no need to reach the question whether a person who had asymptomatic HIV disease was covered under Section 504, because that question went beyond the facts of the case before it. Arline, 480 U.S. at 282 n.7. Lower court decisions both before and after the Arline decision, however, have concluded that asymptomatic HIV disease is also a handicap under Section 504. Congress has reaffirmed that position on two separate occasions and the Department of Justice has recently adopted that view in an official legal ruling.

In one of the early HIV-related cases, both the defendant (the Department of State) and the plaintiffs (Foreign Service employees) in the case argued that HIV-infection alone was a handicap covered under Section 504. The district judge agreed, noting that HIV-infection could be both a physical impairment that substantially limited a major life activity and could be perceived as such an impairment. See Local 1812, AFGE v. Department of State, 662 F.Supp. 50 (D.D.C. 1987). Other courts agreed, finding that HIV-infection alone was covered under Section 504. See, e.g., Ray v. School District of DeSoto County, 666 F.Supp. 1524 (M.D.Fla. 1987); Thomas v. Atascadero Unified School District, 662 F.Supp. 376 (C.D.Cal. 1986). In a recent, comprehensive opinion, a district court in California concluded that the HIV-infected plaintiff was covered because he was perceived as having an impairment which substantially limited a major life activity. See Doe v. Centinela Hospital, 57 U.S.L.W. 2034 (C.D.Cal., June 30, 1988).

On two occasions, Congress has reaffirmed the position that individuals with asymptomatic HIV disease are covered under the handicap discrimination laws. When Congress passed the Civil Rights Restoration Act of 1987, it added a clarifying provision to Section 504, which implicitly acknowledged the Act's coverage of HIV-infection.[3] Several Members of Congress explained that the specific reference to contagious infections in the new provision was to reaffirm coverage of HIV-infection under Section 504.[4] Similarly, when Congress passed the Fair Housing Amendments Act of 1988, several Members noted that both AIDS and HIV-infection were covered under the new law. Indeed, the Committee Report accompanying the bill acknowledges that AIDS and HIV-infection are covered conditions, see House Judiciary Committee Report, at 22 and n. 55, as do the HUD regulations which enforce the Act. 54 Fed. Reg. 3232, 3288 (Jan. 23, 1989).[5]

In September 1988, the U.S. Department of Justice released a legal memorandum concluding that both people with AIDS and people with asymptomatic HIV-infection are covered under Section 504. The Justice Department noted that people with HIV disease were covered under the first prong of the definition of "handicap"--because they had a physical impairment that substantially limited them in the major life activity of procreation--and could be covered under the third prong of the definition if they were perceived as having an impairment that substantially limited them in the major life activity of working or receiving a benefit or service.

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[3] The provision states that:

> [F]or the purpose of sections 503 and 504 of the Rehabilitation Act of 1973, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of such disease or infection, is unable to perform the duties of the job.

[4] A memorandum explaining the Civil Rights Restoration Act's applicability to AIDS-related litigation has been authored by and is available from the AIDS Project. See Feldblum, Civil Rights Restoration Act of 1988: Coverage of Contagious Diseases under Section 504 (June 1988).

[5] A memorandum explaining the Fair Housing Act's applicability to AIDS-related litigation has been authored by and is available from the AIDS Project. See Feldblum, The Fair Housing Amendments Act of 1988 (March 1989); see also § III(E) infra.

III. Substantive Areas In HIV-Related Litigation

A. Employment

As a general rule, plaintiffs who have brought employment discrimination claims because they have been fired for having HIV disease have prevailed, either in court or through settlement. The analysis in the Section 504 cases is straightforward. First, the plaintiff establishes that he or she has a handicap--i.e. that he or she has HIV disease, or is perceived as having this handicap. Second, the plaintiff establishes that he or she was fired because of this handicap or perception of handicap. Finally, the plaintiff establishes that he or she was "otherwise qualified" for the position in question--that is, that he or she was capable of performing the essential functions of the job and that he or she posed no significant risk of transmitting the infection to others (i.e., posed no "direct threat to the health or safety of others"). In light of the fact that, under the consensus of medical opinion, HIV is not transmitted through casual contact in the workplace, plaintiffs invariably are able to make this showing.

One of the major published cases concerning employment discrimination in the HIV context is Chalk v. United States District Court, 840 F.2d 701 (9th Cir. 1988). In that case, Vincent Chalk, a teacher with AIDS, was removed from his job of teaching hearing-impaired children and given an administrative position in his school. The district court refused to halt the reassignment, concluding that despite the overwhelming medical evidence that there was no risk of HIV transmission in the classroom, there was no way to be "completely certain." The Ninth Circuit reversed, noting that the district court had placed an impossible burden of proof on Chalk. The proper standard under Section 504, explained the circuit court, was whether there was a "significant risk" of transmission of HIV. The "overwhelming consensus of medical opinion" advanced by Chalk clearly established the lack of any such significant risk in the classroom. Id., at 707-708.

Successfully litigated employment discrimination cases have been in contexts where the possibility of HIV transmission was inconsequential. In such settings, there is no rational justification for discrimination against HIV-infected persons and thus continued success in litigation can be anticipated. The more difficult employment cases are those which arise in contexts which permit the employer to argue (whether correctly or not) that there is more than a theoretical possibility of HIV transmission from the employee to others. This is particularly true of the health care setting, especially in cases where the employee engages in invasive procedures (e.g., surgery).

A case involving an HIV-infected surgeon was settled by the ACLU of Illinois, with the doctor retaining certain privileges while voluntarily forfeiting others. The AIDS Project and the ACLU of Louisiana recently lost a federal district court case involving a nurse who was suspected of being HIV-infected and was fired for refusing to submit to an HIV test. Leckelt v. Board of Commissioners, Etc., Civil Action No. 86-4235 (E.D.La. March 16, 1989). That case is being appealed to the Fifth Circuit. The ACLU of Northern California is litigating a case on behalf of an HIV-infected doctor whose name was removed from a list of doctors approved for use by FBI agents after the Bureau discovered he was infected.

B. Access to Services

Another line of HIV-related discrimination cases involve claims regarding access to services, such as access to alcohol and drug abuse programs or access to other rehabilitation services that receive federal funds. The structure of these cases are similar, in general form, to the employment cases.[6]

There have not been a significant number of cases, thus far, brought in this area. One case, which was recently settled in the plaintiff's favor, was brought by the ACLU of Southern California against Centinela Hospital's alcohol and drug rehabilitation programs. The plaintiff, John Doe, was denied admittance to the hospital's residential chemical dependency program after testing positive on the HIV antibody test. The hospital had a blanket rule of testing all applicants to the program and excluding those who tested HIV-positive. A federal district court ruled that the plaintiff was covered under Section 504 and that a trial was necessary to determine if the plaintiff was "otherwise qualified" to enter the program. Doe v. Centinela Hospital, 57 U.S.L.W. 2034 (C.D.Cal., June 30, 1988). On January 10, 1989, before trial, the plaintiff and Centinela Hospital announced a settlement of the claim. Under the settlement, the hospital agreed to rescind its policies of testing all patients entering its residential program and excluding those who tested positive.[7]

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[6] First, individuals with HIV-disease, or those perceived to have such a disability, would be covered under Section 504. Thus, such individuals could not be refused access to these services on the basis of their handicap if such individuals were otherwise qualified to receive the services. To be "otherwise qualified," the individual must meet the essential requirements of the program and may not pose a significant risk of transmitting his or her infection to others in the program setting. If a reasonable accommodation (such as using universal precautions whenever coming into contact with bodily fluids) could eliminate the possible risk of transmission, then such an accommodation must be put into the place by the program and the individual would then be considered to be otherwise qualified.

Claims for access to services arise as well in the area of access to health services. The AIDS Project has brought cases against hospitals and nursing homes that have refused to provide care to people with HIV disease, or that have provided substandard care to such individuals. In such cases, the plaintiffs are otherwise qualified to receive the services and the burden thus rests on the health care provider to justify its discriminatory practices.

Two general principles can be deduced from this area of litigation. First, it is nearly impossible for a service or program to justify a blanket rule that requires the testing of all applicants and that excludes those who test positive. Second, before an individual can be excluded on an individualized basis because of HIV disease, a program must be able to demonstrate that the applicant is not "otherwise qualified" to participate in the program. In light of the medical consensus regarding the difficulty of transmission of HIV, that showing will not be easy to achieve in most circumstances.

C. Access to Schools

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[7] A second case, dealing with a hepatitis B carrier rather than with an HIV-infected individual, is working its way through the legal system. In Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989), a 32-year old mentally retarded individual who was a carrier of the hepatitis B virus was denied admittance to a residential facility for handicapped individuals and to a rehabilitation day facility. The district court concluded that Kohl was covered under Section 504, a conclusion upheld by the circuit court, and that the facilities had unfairly discriminated against Kohl. Kohl v. Woodhaven Learning Center, 672 F.Supp. 1226 (W.D. Mo. 1987). The district court concluded, on the basis of the medical evidence, that the risk that Kohl would transmit the virus to others could be sufficiently reduced if the facilities inoculated the staff that would come into contact with Kohl. Id at 1242-1243. Once the facility engaged in this reasonable accommodation, Kohl would then be "otherwise qualified" to enter the programs. Id at 1248. The circuit court disagreed, concluding that it would be necessary to inoculate the entire staff of the facility in order to ensure a sufficient reduction of risk and such a costly endeavor would be beyond a reasonable accommodation. Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989). Rehearing before the entire circuit court has been sought in this case.

The earliest published cases concerning HIV discrimination occurred in the context of children with HIV disease who sought to reverse school board decisions denying them admittance to the classroom. The structure of analysis in these cases is similar to those concerning access to services, although the "otherwise qualified" determination has been even easier for the courts in this area.

Most of the early cases dealt with straightforward efforts on the part of school boards to deny children with HIV disease entrance to the classroom. For example, in Ray v. School District of DeSoto County, 666 F.Supp. 1524 (M.D.Fla. 1987), a district court ordered an elementary school in Florida to allow the three Ray boys, all of whom were HIV-infected, to enroll in school because there was no evidence that the boys would endanger others and because they were suffering irreparable harm by being excluded from a normal classroom environment. A similar result was reached for a five year old boy denied entrance to kindergarten in California. See Thomas v. Atascadero Unified School District, 662 F.Supp. 376 (C.D.Cal. 1987). See also Doe v. Dolton Elementary School District No. 148, 694 F.Supp. 440 (N.D.Ill. 1988); Robertson v. Granite City Community Unit School District 9, 684 F.Supp. 1002 (S.D.Ill. 1988); Doe v. Belleville Public School Dist. No. 118, 672 F.Supp. 342 (S.D.Ill. 1987); Dist 27 Community School Board v. Board of Educ., 130 Misc.2d 398, 502 N.Y.S.2d 325 (Sup. Ct. Queens Co. 1986); Board of Educ. of Plainfield v. Cooperman, 523 A.2d 655 (N.J. 1986).

A variant on the ordinary case took place in Martinez v. School Board of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988). In that case, a federal district court ruled that a seven-year old mentally retarded child with HIV disease could attend a special education classroom if the school, as a reasonable accommodation, built her a separate room within the classroom with a glass window and a sound system. Martinez v. School Board of Hillsborough County, 692 F.Supp. 1293 (M.D.Fla. 1988). The circuit court reversed that decision. Martinez v. School Board of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988). It concluded that the "remote theoretical possibility" of HIV transmission that the district court had found existed through tears, saliva, and urine did not rise to the "significant" risk of transmission that would be required to exclude the child from the classroom. Id. at 1506. The circuit court noted that if a significant risk from other bodily substances were found upon further analysis by the district court, the court still had to choose an accommodation that took account of its effect on the psychological and educational development of the child and that took account of the financial burden on the institution. Id. at 1506-7. On remand, the district court concluded that there was no significant risk of transmission in having the child attend the special education class. The court held that the child was therefore otherwise qualified to attend the class. (No. 87-1308-CIV-T-17, April 26, 1989).

It is now well-settled that there is no medical justification for excluding children with HIV disease from schools, even where such students may exhibit behaviors such as biting.[8]

D. The Fair Housing Amendments Act

The Fair Housing Amendments Act was passed by Congress in August 1988 and becomes effective on March 12, 1989. The bill prohibits discrimination against people with disabilities, including people with HIV disease, in the sale or rental of private housing. This law represents the first step towards extending protection for people with disabilities into the private sector--protection that currently exists in various areas for individuals who experience discrimination based on race, sex, religion and national origin.

The new law prohibits any individual from discriminating in the sale or rental of a dwelling, in the terms or conditions of a sale or rental, or in the provision of services or facilities based on the handicap of a buyer or renter, the hahdicap of a person who is residing in, or intends to reside in, the dwelling after it is sold or rented, or the handicap of any person associated with the buyer or renter.

Thus, for example, under the law, a landlord could not refuse to rent to an individual, and an owner could not refuse to sell to an individual, because (1) that individual had HIV disease, or (2) because that individual had a roommate or partner who had HIV disease and who would live in the dwelling, or (3) because that individual associated with numerous individuals who had HIV disease who would visit the dwelling. In addition, a landlord or owner could not refuse to rent or sell to doctors or to other health care providers, such as alcohol or drug abuse programs, because they would be providing care for (i.e., associating with) people with HIV disease.

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[8] An important factor to note in school litigation is the possible applicability, in addition to Section 504, of the Education for All Handicapped Children Act, 20 U.S.C. § 1400 (1982 & Supp. III 1986). From a litigation viewpoint, the latter Act is less satisfying in that it requires exhaustion of administrative remedies, which can be quite long and time consuming, while the Rehabilitation Act has been interpreted as not requiring exhaustion. See Robertson v. Granite City Community Unit School District 9, 684 F.Supp. 1002, 1005 (S.D.Ill. 1988); Doe v. Belleville Public School Dist. No. 118, 672 F.Supp. 342 (S.D.Ill. 1987). See also Martinez v. School Board of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988).

IV. The Americans with Disabilities Act of 1989

The Americans with Disabilities Act of 1989 (ADA), introduced in Congress on May 9, 1989, continues the movement begun by the Fair Housing Amendments Act by extending non-discrimination protection in the private sector. First, the ADA prohibits discrimination on the basis of handicap by private employers with 15 or more employees--similar to the coverage of Title VII of the Civil Rights Act of 1964. Second, it prohibits discrimination in the range of public accommodations that are run by private entities, such as hotels, restaurants and shopping centers. This provision includes both prohibiting attitudinal discrimination and establishing requirements for accessible construction. Third, the bill prohibits discrimination in the various public services that are offered by state and local governments that do not otherwise receive federal funds. (Transportation issues are covered under both the public services and public accommodations sections of the bill.) Finally, the bill requires the establishment of communication relay systems.

The bill provides that individuals with disabilities may not be denied the opportunity to participate in a program, job or benefit, and may not be provided unequal services, solely because of their disabilities. It also establishes that it is discriminatory to fail to remove architectural, transportation or communication barriers in any of the areas covered, to fail to make reasonable accommodations for people with disabilities in employment settings and to fail to provide auxiliary aids in services and programs.

People with HIV disease are covered under the ADA, just as they are covered under Section 504 and the Fair Housing Amendments Act. (The same definition of "handicap" or "disability" appears in each of the three laws.) It is expected that the basic caselaw of Section 504 will apply to the ADA as well.

May 29, 1989.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION
ALBANY 12223

PETER A. BRADFORD
CHAIRMAN

THREE EMPIRE STATE PLAZA
(518) 474-2530

June 2, 1989

Thomas Harkin
Subcommittee on the Handicapped
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-6125

Dear Senator Harkin:

This is in reference to your proposed legislation, the Americans With Disabilities Act of 1989, and in particular Section 502, which addresses the provision of telecommunications relay services. The New York Department of Public Service commends and supports your efforts and those of your Subcommittee in seeking to make such services available on a universal basis. These services enhance the universality of telephone service by affording meaningful telecommunications access to deaf and hearing and speech-impaired individuals.

As you may know, New York has had significant, first-hand experience in establishing a relay service on an intrastate basis. In April, 1987, the New York Public Service Commission promulgated a regulation which made the provision of a relay service the responsibility of all local exchange companies in New York. The regulation called for the relay service to be operational on or before January 1, 1989. The service, operated by AT&T on behalf of the local exchange companies, began operation on January 1 and for the first three months has completed more than 161,000 calls.

Inasmuch as the Federal Communications Commission (FCC), and not the states, has jurisdiction over interstate calling, New York's service is available only for intrastate calling. It is thus imperative that the FCC take similar steps to establish relay services on an interstate basis and the Department has urged the FCC in its current proceeding to require the establishment of such interstate services. In our view, the limitation on extending relay service availability to the interstate jurisdiction is not operational, but rather administrative. There is no technical reason why the New York facility could not handle interstate calls as well. Any steps that can help surmount the administrative obstacles would be welcome.

We, therefore, support legislation designed to promote full interstate accessibility. However, with respect to the specific language of Section 502, we have enclosed an attachment suggesting some proposed modifications that would clarify ambiguities. The modifications seek to make clear that the FCC has an affirmative obligation to ensure the provision of a relay service on an interstate service. Also, we do not believe that states should be subject to FCC rules for the provision of intrastate services and, thus, recommend deleting such language in Section 502(b). In any event, should future federal rules apply to intrastate relay services, current programs, such as New York's relay service, which are operating effectively, should be grandfathered.

Once again, we commend the Subcommittee's efforts to create telecommunications independence for citizens who—must use TDDs and other nonvoice terminal devices for telephone communications. Please do not hesitate to contact me if we can be of any further assistance.

Sincerely,

Peter Bradford

Peter Bradford

Enclosure
fhm/689-13

ATTACHMENT I

Proposed Modifications to

S 502. Telecommunication Relay Services

(delete portions in brackets and add underlined portions)

(b) STATE DISCRIMINATION - It shall be considered discrimination by a State, that designates an entity to provide [interstate or] intrastate telecommunication relay services to individuals throughout the entire State [in a manner consistent with regulations issued by the Commission] for purposes of this Act, for such State, through the designated entity, to fail to provide, not later than 1 year after the date of enactment of this Act [interstate or] intrastate telecommunication relay services so that such services provide individuals who use nonvoice terminal devices because of disabilities with opportunities for communications that are equal to those provided to their customers who are able to use voice telephone services; except that the provisions of this subsection shall not apply to any state which has issued regulations prior to the enactment date of this Act which requires all telephone corporations, either individually or in concert with other telephone corporations operating within the state, to provide intrastate telecommunication relay services to enable communications between individuals who use nonvoice terminal devices because of disabilities and persons who are able to use voice telephone services[.]

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PAUL RODGERS
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Treasurer

May 26, 1989

Honorable Tom Harkin
Chairman
Subcommittee on the Handicapped
Committee on Labor and Human Resources
113 Hart Senate Office Building
Washington, D.C. 20510

Re: Statement for the Record of Hearings on the "Americans with Disabilities Act"

Dear Chairman Harkin:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), we respectfully request that this letter and the attached policy resolutions be included in the formal record of the Subcommittee's recent hearings on S. 933, proposing the "Americans with Disabilities Act of 1989".

The NARUC represents the State regulators of telecommunications common carriers and, therefore, has a keen interest in Title V of your bill which proposes guidelines for the expansion of dual party telecommunications relay services.

Many States have established relay services for intrastate calling through State PUCs, other State agencies or public interest organizations. However, States do not have regulatory jurisdiction over interstate telecommunications which lies with the Federal Communications Commission.

On October 1, 1987, the NARUC petitioned the FCC to establish a Further Notice of Inquiry in CC Docket 87-124 to seek specific proposals for the establishment of an interstate relay service [See Appendix A]. The FNOI was released on March 29, 1988, and the proceeding is currently pending.

With FCC and/or congressional action necessary to establish interstate relay services, the NARUC and other interested parties began drafting legislation in the event the FCC was unwilling or unable to establish a nationwide system. The NARUC is delighted that, through your leadership, the Congress will actively consider such legislation this year.

At the time the NARUC was actively involved in drafting legislative proposals, our Executive Committee adopted the enclosed **Resolution on Message Relay Legislation** [See Appendix B]. While Title V of your bill differs in some respects from the legislation contemplated at that time, the NARUC urges your Subcommittee to consider the following concerns reflected therein:

1. **Flexibility.** In States which already have operating relay services, the details of the programs were the subject of regulatory rulemaking proceedings and/or legislative consideration which incorporated the needs of relay users, telephone subscribers and telephone utilities in that State. Federal legislation should avoid disrupting State programs which are already operational and should not restrict the ability of States to tailor future relay programs to the needs of their citizens.

2. **Preemption.** The NARUC is also concerned that the FCC may be granted too much authority in S. 933 to dictate guidelines for State programs. Accordingly, pursuant to the NARUC Resolution, we request that Section 503 be amended to refer the task of establishing standards and guidelines for telecommunications relay services to an FCC Federal-State Joint Board as provided for by Section 410(c) of the Communications Act of 1934. For many years, the joint board process has proven an effective means for resolving telecommunications issues which affect both FCC and State regulatory jurisdictions.

3. **Efficiency.** Undoubtedly, telephone ratepayers will bear the additional costs of establishing new telecommunications relay services, so the legislation should be permit these services to be provided with as little duplication of facilities as possible. Under the terms of the legislation, carriers will likely encourage States to establish State-wide programs which will exempt them from the obligation in 502(a) of providing the service themselves. Currently, most State relay systems do not handle interstate telephone calls. It would be expensive and inefficient, however, to require all long distance carriers to provide their own service.

Therefore, the joint board referenced above should be authorized to establish the necessary rules, if it can develop a method (consistent with FCC rules and the AT&T Consent Decree) whereby inter- and intrastate services could be provided more efficiently by using the same operators or by some other means. Along the same lines, the Subcommittee might consider leaving the option open for regional relay centers in Section 502.

The NARUC applauds the sponsors of S. 933 for recognizing the importance of expanding dual party deaf relay services in the United States, and we look forward to working with you on this legislation in the coming months. Please feel free to call on us if you have any questions.

Sincerely,

CM Chambers

Paul Rodgers
General Counsel

Caroline M. Chambers
Director, Congressional
Relations

Enclosures

APPENDIX A

Resolution Supporting Expansion of Deaf Relay Services and Requesting FCC Investigation of Interstate Services in Docket No. FCC CC 87-124

WHEREAS, There is a continuing need to assure the hearing impaired community reasonable access to telecommunications services and to enhance the ability of the deaf to communicate with persons of normal hearing by telephone; and

WHEREAS, The California Relay Service, which became operational on January 1, 1987, has successfully expanded the operational scope of all California deaf persons with a Telecommunications Device for the Deaf (TDD) to enable two-way communications with all hearing telephone users in the State through translation of TDD and voice messages at the relay center; and

WHEREAS, More than a dozen other States are now investigating or are in the process of establishing statewide relays systems for communication between TDD and voice telephone; and

WHEREAS, The Federal Communications Commission (FCC) initiated a proceeding, CC Docket No 87-124, to request comments, information, and proposals to improve telecommunications by deaf and hearing impaired persons; and

WHEREAS, In CC Docket No. 87-124, a number of interested parties have supported creation of an interstate relay service to provide benefits to the deaf and hearing impaired; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), assembled in its Summer Committee Meeting in San Francisco, California, supports the expansion of relay systems for the deaf and hearing impaired to provide the capability to communicate with hearing telephone users; and be it further

RESOLVED, That the FCC, State commissions and telecommunications industry are requested to take the steps necessary to expand deaf relay services nationwide and interstate at an early date; and be it further

RESOLVED, That to facilitate investigation of the feasibility of an interstate relay service, the NARUC General Counsel be directed to file a petition with the FCC transmitting this Resolution and requesting the FCC to establish a Further Notice of Inquiry in CC Docket No. 87-124 seeking specific proposals for the establishment of an interstate relay service, which could be implemented at an early date.

Sponsored by the Committee on Communications
Adopted July 23, 1987

APPENDIX B

Resolution on Message Relay Legislation

WHEREAS, Legislation is being drafted and may be introduced shortly to encourage the establishment of a nationwide message relay system for communicating with the deaf, speech or otherwise impaired; and

WHEREAS, The Federal Communications Commission has not granted the NARUC's request that it establish a Further Notice of Inquiry in CC Docket, No. 87-124 with specific proposals for the establishment of an interstate relay system; and

WHEREAS, As many as eleven States currently fund and operate their own State-wide message relay systems; and

WHEREAS, Most State-wide message relay systems are unable to satisfy the demand for service because of lack of funds and personnel; and

WHEREAS, Most State-wide message relay systems cannot connect interstate telephone calls; and

WHEREAS, Message relay systems providing both intra- and interstate interconnection are most effectively administered on the State level; and

WHEREAS, Federal funding would help more States to establish message relay systems; now, therefore, be it

RESOLVED, that the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), assembled in its Winter Committee Meeting in Washington, D.C., supports legislation which would encourage the creation of a nationwide message relay system for communicating with the deaf, speech or otherwise impaired, by making Federal funds available to States with qualifying programs, as long as:

1) State participation be voluntary; and

2) States have flexibility as to the characteristics their message relay systems and the mechanism used to derive the State funds; and be it further

RESOLVED, If such legislation were to grant the FCC certification authority over the States' programs, a Federal-State Joint Board pursuant to Section 410(c) of the Communications Act of 1934 should be established to recommend standards for message relay systems and guidelines for State certification.

Sponsored by the Committee on Communications
Adopted March 3, 1988

The National Center for Law and the Deaf
800 Florida Avenue, N.E., Washington, D.C. 20002 • Voice or TDD (202) 651-5373

June 2, 1989

The Honorable Tom Harkin
United States Senate
Committee on Labor and Human Resources
Washington, D.C. 20510-6300

Dear Senator Harkin:

This is in response to your letter of May 19, 1989 to Mr. Paul Taylor, requesting answers to several questions about Title V of the Americans With Disabilities Act. Mr. Taylor has consulted with our law center and has requested that we submit the following answers to you on his behalf:

1. Status and nature of the FCC proceeding concerning the telecommunications relay system: On March 24, 1988, the FCC adopted a Further Notice of Inquiry ("FNOI"), seeking specific proposals for the implementation of an interstate relay system. CC Docket 87-124 (released March 29, 1988, reported at 53 Fed. Reg. 12546 (April 15, 1988)). The Commission specifically requested information on the need for an interstate system, an economic and technical analysis for the operation of a system, proposed rules for its use and administration, and an analysis of the Commission's authority to order a system and establish a mechanism for its funding. The FCC received a major response to its FNOI. Over 50 organizations representing hearing impaired telephone subscribers submitted comments. Additionally, comments were received from telephone service and equipment providers, state relay systems, and state public commissions.

The FCC was directed by Congress to complete its inquiry on an interstate relay system within 9 months after passage of P.L. 100-542, which was enacted on October 28, 1988. While the FCC will not reveal whether or not it will meet its July, 1989 deadline, Mr. Robert James of the FCC has indicated that the Commission expects to make an announcement regarding the inquiry on July 13, 1989, at the upcoming DEAFWAY/TDI convention.

Please note that the FCC's proceeding concerns interstate

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relay systems only, while the ADA requires relay systems for both intrastate and interstate telephone calls.

2. (a) Action by interstate and intrastate telephone companies on the date of the ADA's enactment and the weeks thereafter:

Interstate company - I would suggest that my company get in touch with competing companies to consult or contract with an independent and non-competitive organization that understands telecommunications. One such organization might be the National Association of Regulatory Utility Commissioners (NARUC). NARUC is very familiar with the concept of telephone relay systems and might be a likely candidate to devise, within one year, a telephone relay system for long-distance carriers. An alternative approach is to consult with a major state that has had an intrastate relay system to determine the best way to divide up the responsibilities to provide relay services under the Act.

Intrastate company - California, New York, Alabama, Arizona, Minnesota, Oklahoma, and Washington State are among the states that have statewide relay systems. In all of these states, coordination has taken place among the various telephone companies of those states. Typically, the independent telephone companies in a state are represented by a state telephone association. Were I an intrastate telephone company subject to the provisions of the ADA, I would contact my state telephone association. The association could conduct studies of the various existing relay systems in other states and could recommend the best way to start up a new system.

For both interstate and intrastate telephone companies, coordination among the various telephone providers is critical to avoid duplication of efforts. In New York, for example, 41 telephone companies were able to join together under one contract to implement a statewide relay service operated by AT&T.

2(b). Confusion between Sections 502(a) and 502(b):

Section 502(a) requires all common carriers to provide relay services. However, in those states where the state or its designee already provides such services, common carriers are exempt from Section 502(a)'s requirements. In order for the common carriers of a state to qualify for this exemption, the existing state program must meet the minimum standards and guidelines issued by the FCC. You are correct, then in stating that if a state has a program which falls short of these standards, the common carriers of that state must still fulfill their obligation under Section 502(a) to provide relay services that meet the FCC's guidelines.

You also asked whether the telephone companies of a given state would be confused as to whether or not they are required to provide relay services. Notwithstanding the lack of an ADA requirement requiring the states to designate an entity to provide relay services, the telephone companies should have knowledge as to whether relay services exist in a state. Because state relay programs are typically regulated or funded with the assistance of the state public service commission, all that the companies need do is to contact the public service commission to find out the status of the state's involvement on this matter. Thus, there should be little confusion on this point.

3. Cost of compliance: The costs of providing relay services work out to pennies per month for each telephone subscriber. Gerald Hines of AT&T provided information at the recent Senate hearings about the various surcharges - from 3 to 20 cents per month - that have been imposed on subscriber bills in many of the state relay programs. This should be compared to the overwhelming costs to society of keeping hearing impaired people dependent on others to make their calls for them. This should also be compared to the high federal subscriber line charge of over $3.00 per month imposed on all consumers since the divestiture of AT&T.

Costs just for AT&T?: Gerald Hines of AT&T gave testimony before the Senate Committee that a nationwide relay service (both intra- and interstate) would cost approximately $250 million dollars). This figure is based on what AT&T would charge to operate and administer relay programs throughout the country. On occasion, non-profit corporations have been able to provide relay services at lower costs that those estimated by AT&T. In Utah, for example, the Utah ASsociation for the Deaf, a non-profit organization won the contract to provide relay services for that state because their bid was for only $192,000, as compared to AT&T's bid of $400,00 to 600,000.

Technical difficulties in setting up an interstate system: This question would be better posed to AT&T, which has more experience with interstate telephone services. However, it is our understanding, based on comments submitted by AT&T to the FCC in its recent FNOI, that there would be no technical difficulties to establishing an interstate relay system within one year.

4. Number of companies that operate interstate relay systems; duplication of efforts:

At present it is difficult to determine the number of telephone companies that provide interstate relay services. However, state telephone associations exist in most, if not all, states. These associations, together with the public service commissions, and the FCC can work to avoid duplication of services. As is done in New York for intrastate services, interstate companies can coordinate with one another so that actually only one or two entities would be responsible the provision of the long distance relay services.

5. Penalties for noncompliance: The penalties for noncompliance with Title V seem reasonable.

6. Leave this issue to the pending FCC proceeding?:

This issue should not be left to the FCC. The FCC proceeding now pending concerns interstate relay services only; it is not clear that the FCC is willing to initiate proceedings for the implementation of intrastate services, notwithstanding their authority to do so. When the ADA becomes law, however, the FCC should be the agency required to establish minimum standards and guidelines for the relay programs set up throughout the nation.

Sincerely,

Karen Peltz Strauss

Karen Peltz Strauss
Supervising Attorney

Direct Connect

MINNESOTA
RELAY
SERVICE

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Sen. Tom Harkin
Chairman, Subcommittee
on the Handicapped
Commitee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-6300

May 25,1989

Dear Sen. Harkin,

It was my great pleasure to testify on behalf of the Americans with Disabilities Act of 1989. I would like to thank you for the opportunity to speak out for this historic bill.

In response to Senator Hatch's questions in your letter of May 19:

1. I am presently attempting to gather additional information on the FCC proceedings and I will forward that to you as soon as possible.

2. a) As an intrastate or interstate company, upon passage of the bill, I would need to determine if a sufficiently comprehensive Relay Service was already provided in my state. Research should begin immediately, as should job searches for administrative positions. Decisions need to be made as to exact funding sources (i.e., surcharges or base rates). Extensive research would be needed in the area of deafness, Deaf Culture and Language, though I question how many intrastate and interstate companies are aware of just how extensive that research must be. Perhaps that could be included in the FCC regulations to insure quality of service.

b) My interpretation of Section 502 (b) is that if a state has previously designated an entity to provide relay service (as in the half-dozen states currently offering service) the common carriers in that state are not obligated to provide a separate service, as long as the designated entity provides service in a manner consistent with the regulations issued by the Commission. It would certainly be more cost and work efficient for the common carriers to fund the existing service to enhance or improve that service to insure it meets the regulations, rather than beginning a new service from the ground up.

I agree that the other phone companies would be in violation of the bill if the designated entity fails to provide service properly.

I do question, however, whether common carriers are capable of providing proper service. Those relay services currently operated by AT&T are providing only intrastate service (even after several years of operation in CA). The California Relay Service, in fact, is currently being sued by the Deaf Community through an organization named Greater Los Angeles improvements of the service. A hard-of-hearing woman has been hired as a trainer but there are no deaf persons with policy making authority. During TV news stories on the opening of the CRS, cameras were let in the Relay Center and allowed to film relay calls in progress, revealing terminal screens with the TDD conversation, the voiced response by the operators and operators' faces. All of these are flagrant violations of privacy and confidentiality.

3. Setting up interstate service is no more costly or difficult than intrastate service. It is merely a question of adding long distance phone lines or choosing a long distance carrier. There is no reason for the carrier or designated entity not to establish intrastate and interstate service at the same time.

Actual cost depends also on the size of the communication impaired population in that state which determines the size of the service needed. Minnesota's Service was set up at a cost of approximately $750,000. South Dakota is attempting to start a service at this time with a budget of $380,000.

One year is adequate time if immediate action is taken upon or prior to passage of the bill. However, because of the research necessary and the limited number of sources available, one and a half to two years might be more realistic. Upon passage of the bill it is certain that the few existing relay services will be literally flooded with requests for detailed information

4. I am unfamiliar with the exact definition of "common carrier" in the Communications Act of 1934, but the bill states that any common carrier must provide relay service. This would be unnecessarily duplicative and would make quality control difficult. A TDD/telephone relay service is vastly different from average phone service. It could end up as a great disservice to the communication impaired community to offer several relay systems of varying quality. A safer solution may be to have one centralized relay center (perhaps funded by all the common carriers of that state). This would offer better quality control and assurance of confidentiality. The service can be located in the area of highest population density for two reasons: 1) to draw on the largest employee pool and 2) these areas often have more social services and therefore attract large numbers of disabled people. In Minnesota, for example, over 50% of the communication impaired population reside in and around the Twin Cities. Currently 86% of our incoming calls come in on local phone lines, thereby lowering our phone costs.

Another possibility is to establish regional relay centers covering several states. This would be especially cost effective for states with low populations if the funding were to be done through a surcharge or from the carrier's base rate.

5. I feel the penalties for noncompliance in this bill might be raised and redirected. Currently the bill mandates that the carrier or state failing to comply shall forfeit to the United States the sum of $10,000 for each offense. I would suggest that this amount could be raised (perhaps doubled) and the money distributed to agencies (state-run and non-profit) in that state which provide services to communication impaired persons.

I look forward to any further assistance I can offer. Please don't hesitate to contact me.

Sincerely,

Robert B. Yag

Robert B. Yaeger
Unit Manager, Direct Connect
Minnesota Relay Service

AT&T

Gerald A. Hines
Director
SLD Product Management

Room 6157H2
295 N. Maple Avenue
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201 221-6167

June 2, 1989

The Honorable Tom Harkin
Chairman
Subcommittee on the Handicapped
United States Senate Committee
on Labor and Human Resources
Washington, D.C. 20510-6300

Re: American with Disabilities Act of 1989
Title V - Telecommunications Relay Services

Dear Senator Harkin:

Your May 19, 1989 letter posed certain questions regarding Title V of the Americans with Disabilities Act of 1989, which addresses telecommunications relay services. I have enclosed our responses to these questions.

In certain instances, the proposed legislation conflicts with its goal to provide an effective nationwide telecommunications relay system. I believe a workable alternative can be crafted that meets the needs of telecommunications relay providers and ensures that quality service is provided to the consumer. Toward this end, I plan to spend thirty days meeting with industry members and consumer advocates to develop such a proposal. I will report to you the results of my effort shortly thereafter.

Sincerely,

Enclosures

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Responses to Questions Regarding the Americans with Disabilities Act of 1989

1. Could you describe the nature and status of the FCC proceeding concerning telecommunications relay systems?

On March 29, 1988, the Federal Communications Commission released a Notice of Proposed Rulemaking and Further Notice of Inquiry in CC Docket No. 87-124. The Commission addressed interstate telecommunications relay services ("Dual Party Relay") in the Further Notice of Inquiry portion of its order. The Further Notice of Inquiry asked searching questions about Dual Party Relay, but proposed no rules. Interested parties, including AT&T, filed comments and reply comments. Public Law 100-542 requires the Commission to complete its existing inquiry by July 28, 1989.

Should the Commission believe that the comments received warrant action within its jurisdiction, its next step would be to issue a Notice of Proposed Rulemaking proposing rules relating to Dual Party Relay. In such event, interested parties would have the opportunity to file comments and reply comments. Thereafter, the Commission might issue rules taking the proposed action, issue a Further Notice of Proposed Rulemaking proposing new and different rules, or abandon its proposals.

2. (a) You have the language of the bill. If you are an interstate or intrastate company, what do you do on the date of the bill's enactment and in the weeks thereafter?

If the legislation were enacted, AT&T would take whatever steps were necessary to comply. The legislation's present text would require AT&T to provide Dual Party Relay on both an interstate basis and in the 41 states in which AT&T provides intrastate service. As discussed below, the states would have no incentive to provide Dual Party Relay (and, in fact, would be encouraged to abandon existing efforts). Because few, if any, carriers would be relieved of their obligation by state action pursuant to section 502(b), AT&T contemplates that every "common carrier" would be required to provide some form of Dual Party Relay.

In such a scenario, AT&T would establish at least seven new centers to provide the required service, at a cost of approximately $250 million or more per year. It would take at least 12 months to bring such centers on line, and AT&T would have to hire and train attendants to staff the centers. Further, AT&T would have to negotiate billing arrangements with over one thousand local exchange companies.

Absent a funding mechanism, AT&T would have to recover its costs in some manner. Because of the competitive nature of AT&T's telecommunications business, AT&T could not recover such costs from the general ratepayer. At this time, AT&T has not identified a viable alternative.

Finally, because each common carrier would have its own Dual Party Relay system, incompatible systems could be developed and customers could be confused as they switched from one system to another.

2. (b) Won't this section as written likely create confusion in many states? Please comment on the following analysis: Section 502(a) requires all common carriers offering telephone service to provide interstate and intrastate telecommunication relay services within a year, unless section 502(b) applies. Section 502(b) says, "it shall be considered discrimination by a state, that designates an entity to provide interstate or intrastate telecommunications relay services" to the state's citizens for the "state, through the designated entity, to fail to provide within a year, such services. The language of Section 502(b) does not _require_ a state to designate an entity to provide these services. So the telephone companies won't know whether to provide the services. Even if a state _does_ designate an entity, the way this section is worded, all of the other telephone companies remain at risk of being in violation of the bill, if the designated entity fails to provide service properly.

Your analysis points out a serious infirmity in the draft legislation. First, AT&T does not believe that the provision of Dual Party Relay is a traditional common carrier function that common carriers should be _required_ to provide. Instead, AT&T believes that Dual Party Relay should be provided as it is today, _e.g._, as a special function provided by professional suppliers. This approach ensures that the hearing-impaired receive the benefits of superior service, and the innovation that competition promotes.

In addition, section 502(a) may undermine state-provided Dual Party Relay. As described in my filed testimony, many states provide Dual Party Relay through a single provider operating under an arrangement with a state-approved entity. If every common carrier in a state is required to provide Dual Party Relay, the efficiencies promoted by centralization of such services may well be lost.

Further, section 502(b), although designed to mitigate the burden on common carriers where states undertake to provide Dual Party Relay to their citizens, may discourage state action to implement Dual Party Relay. If a state designates an entity to provide Dual Party Relay, it runs the risk that it could be found to discriminate in violation of the statute if the entity does not provide the service properly. If a state takes no action, it incurs no risk that it will be charged with discrimination.

As set forth in my filed testimony, AT&T believes that any national Dual Party Relay system should build upon the state systems already in place. In recent years, we have seen much activity in state capitols to implement Dual Party Relay by designating entities to perform this function. The legislation, as presently drafted, would disperse this responsibility over more than a thousand common carriers, and could undermine the emerging state efforts to provide Dual Party Relay.

We believe Congress should encourage the provision of Dual Party Relay by providing for: (1) a means of funding the Dual Party Relay system and (2) the establishment of minimum standards for Dual Party Relay.

3. What would you estimate would be the cost of compliance with the bill's interstate relay requirements? Is this for just AT&T? What are the technical difficulties in setting up an interstate system? Is one year adequate time?

The cost to comply with the proposed interstate Dual Party Relay requirements would vary with the nature of the system established. For example, a single system for all states would entail different costs than a system for each state or carrier. We have calculated that it would cost approximately $30-40 million per year for AT&T to establish an interstate Dual Party Relay system using its existing three centers and an additional center. This estimate is based on our projections of current Dual Party Relay volumes. However, if the establishment of a nationwide system stimulates additional volumes, the costs could be greater than our estimate.

We could establish within a year the additional center necessary to provide interstate Dual Party Relay only. However, AT&T might not be able to meet such a deadline if it were required to establish the additional centers necessary to provide intrastate service during the same timeframe.

4. This language imposes requirements on the operating companies, at least where the states don't act. How many companies provide interstate telephone services? And would they all be required to establish a relay system? Would that be unnecessarily duplicative?

In addition to AT&T, there are over 500 companies that provide interstate telephone service. Under the legislation, they would be required to provide Dual Party Relay unless the exception contained in section 502(b) applied. In addition, the legislation's language that "any common carrier" be required to provide intrastate Dual Party Relay would bring over 1400 intrastate carriers within its coverage.

This legislation seeks a unified interstate and intrastate Dual Party Relay system. Yet, section 502(a) would impose a separate obligation on each carrier. While there is room for more than one provider of Dual Party Relay, it would be unnecessarily duplicative to require that every common carrier establish its own Dual Party Relay capability.

5. How do you feel about the penalties for noncompliance in the bill?

Although the penalties provided for in section 504(4) may be appropriate in other contexts, we believe they are inappropriate in this legislation.

First, the legislation is new, general in nature, and subject to interpretation. For example, section 502(a) would require every common carrier to provide users of nonvoice terminal devices opportunities for communications that are "equal" to those provided to users of voice telephone services. Whether the Dual Party Relay a carrier provides is equal to the communications opportunities provided other customers is an issue on which reasonable minds may differ. Yet, the carrier that misinterprets its obligations under the statute or yet to be issued Commission regulations could experience severe penalties.

Second, carriers provide services to a multiplicity of customers. If a particular practice or method by which a carrier delivered Dual Party Relay were considered to be a violation of the statute or Commission regulations (even if the result of mere negligence), the carrier could face massive penalties under the "Separate Offenses" section unwarranted by the nature of the offense. In California, for example, where AT&T handles 250,000 relay calls per month, a negligent failure to comply with the statute or regulations for 30 days could result in potential liability of $2.5 billion if courts were to construe each call as a separate offense.

We believe that the legislation should encourage innovation in the provision of telecommunications services to the hearing impaired. The severe penalties which section 504 might impose may deter such creative efforts on the party of Dual Party Relay providers.

6. Is this entire issue better left to that pending FCC proceeding?

The Commission has performed a valuable service by establishing a dialogue on Dual Party Relay issues; the results of that effort should not be lost. However, the Commission has limited power in this area. It faces certain jurisdictional limitations, and its authority to authorize funding for Dual Party Relay is limited.

Congress can provide leadership in areas which the Commission cannot. Congress can establish a national consensus favoring a nationwide Dual Party Relay system. Congress can resolve jurisdictional issues. Congress can authorize the Commission to adopt minimum standards for the provision of Dual Party Relay on both an interstate and intrastate basis. Finally, Congress can provide the funding mechanism essential to the establishment of an effective, nationwide Dual Party Relay system. These are the steps which Congress can take to encourage the early establishment of a nationwide Dual Party Relay system.

Comment
The Arizona Daily Star
Founded 1877
Michael E. Pulitzer, Editor & Publisher Susan J. Albright, Editorial Page Editor

EDITORIALS

Breaking barriers

to Mark
Star
11/5/89
A-8

Federal protection for disabled long overdue

Capitol Hill is a-cracking — with the faint sounds of barriers breaking. The noise accompanies the introduction of the Americans With Disabilities Act of 1989.

The act would extend civil-rights protections to disabled people in the areas where historically they have been shut out: the private employment sector, public accommodations (such as movie theaters and shopping malls), transportation, communication and state and local services.

About 37 million Americans have some type of physical or mental disability, according to the Census Bureau. Yet the government has not strongly spoken out in their behalf: the landmark Civil Rights Act of 1964 does not cover the disabled.

Sen. Tom Harkin, D-Iowa, who introduced the measure, rightly portrayed it as an "emancipation proclamation" for one of the most politically powerless groups in the nation.

That powerlessness, and the lack of federal protection, has forced some handicapped people into lonely, segregated lives. The barriers society has erected for them range from a wheelchair-bound person being unable to ride a regular bus to work or eat in a certain restaurant, to a deaf woman being unable to communicate with a hearing friend over the telephone, to an epileptic man unable to get a job because of employers' fears or prejudices about his condition. This act would address all these areas.

The most dramatic evidence of discrimination against the disabled is shown in unemployment figures. About 66 percent of disabled Americans of working age are unemployed, although most said they would rather be working, according to a Lou Harris poll.

The 1989 act is a revision of an ambitious measure that failed to get off the ground last year. It is more politically and economically realistic than its predecessor, and already enjoys bipartisan support in Congress.

The Americans With Disabilities Act of 1989 strikes a balance between the socially deleterious notion of doing nothing and expensive, politically unpalatable mandates to retrofit existing businesses and facilities to provide access.

For example, under the original act, some businesses would have been required to retrofit their facilities to make them accessible to the disabled. Under the new act, businesses would be allowed to make less-expensive changes, such as installing a ramp, to provide accessibility.

Dependency exacts a high cost, socially and financially. The government spends $57 billion a year in disability benefits and handicapped-related programs.

Making it possible for more disabled people to work and play with the rest of society would have many benefits. They would become taxpayers, instead of welfare recipients. And they would contribute their talents to the community as equal pursuers of the American Dream.

Congress must send out a clear, strong message that Americans are to be judged on their abilities, not pre-judged because of disabilities.

LETTERS TO THE ED

INS standards

A Soviet youth who wanted to live
in America because it would be bett
for his chess career has been allowe
legal residency. People fleeing war
and death squads in El Salvador get
deported because the Immigration
Naturalization Service claims that t
are here for only economic reasons.

Hard-working families with
children in school here can be
deported for illegal residency with
hours, yet a man wanted as a suspe
in some especially gruesome murd
"can't" be deported for months, ma
a year.

Obviously even the pretense of
being fair is gone from INS.

Mark Tomás B

With friends like the

Hmm. Let me see if I've got th
straight.

In 1987 it was estimated 246 re
squirrels romped about atop Mou
Graham, apparently content with
plight in life.

Since then, the University of
Arizona, the U.S. Fish and Wildlife

Queens
Independent
Living Center
140-40 Queens Boulevard, Jamaica NY 11435 718/658-2526 TTY 718/658-4720

TESTIMONY

PRESENTED TO

THE UNITED STATES SENATE
SUBCOMMITTEE ON THE HANDICAPPED

BY

MICHAEL M. MCINTYRE

QUEENS INDEPENDENT LIVING CENTER

MAY 16, 1989

Good afternoon. My name is Michael McIntyre. I am the Executive Director of Queens Independent Living Center, a non-residential, not-for-profit, resource, support and advocacy organization run by and for people with disabilities. Queens Independent Living Center is also a member of the National Council of Independent Living Centers. I appreciate this opportunity to present testimony to you today in support of the Americans with Disabilities Act of 1989 (ADA).

The success of the Americans with Disabilities Act, the most critical legislation affecting individuals with disabilities ever considered by the Congress, will depend greatly upon your support and the support of Congress. This legislation represents a national policy to protect the rights of persons with disabilities in the private and public sector. This is the definitive civil rights bill for people with disabilities.

The Act prohibits discrimination on the basis of disability in areas such as employment, housing, public accommodations, travel, communications, and activities of state and local governments.

This bill has many provisions that will prohibit discrimination against individuals with disabilities in the United States. However, I would like to direct my testimony to the issue of discrimination against individuals with disabilities in the area of transportation.

On behalf of the National Council of Independent Living Centers members, we strongly urge you to support ADA transportation provisions as it stands. As someone who serves as an advisor to the New York City Department of Transportation and as a consultant to private bus companies, I have a professional expertise in the area of accessible public transportation. As a motorized wheelchair user, I also have a personal knowledge of what an accessible transportation system can mean to a person who is physically disabled.

Living in New York City, I am very fortunate to be able to use the city's accessible public bus service, along with key accessible subway stations. There are now plans by the New York City Department of Transportation to start a para-transit program this summer in order to provide a needed service for the transportation-disabled who can not use accessible buses or subways because of their disabilities. I use public transportation daily to go to work and to social functions. I have been using lift-equipped buses since 1983. It is the only affordable means of transportation for persons with disabilities who want to be part of the mainstream of our society, and for those who want to have the independence of not being tied to a fixed schedule, and to enjoy the freedom of choice all others do who are non-disabled.

Americans have traditionally enjoyed many freedoms. Many Americans, however, have not been able to exercise those freedoms, for the lack of the simple ability to travel. The freedom to go to college does not exist without the means to get to the college; the freedom to work does not exist without the ability to get to work; the freedom to organize politically does not exist without people being able to get together in one place; the freedom to date, to go to the movies, to go to the library, to go shopping, to go to a ballgame, to go to the zoo, to anyplace that makes life meaningful, is predicated on the ability to travel.

If freedom is an abstract word, money is not. With the ability to travel, many disabled Americans will be able to get the education that will in turn get them meaningful jobs, that will allow them to become tax payers instead of tax users.

The issue of transportation has been a symbol in the civil rights struggle for Black Americans in the fight against discrimination. Today it plays a significant role in the civil rights movement of persons with disabilities. Public transportation must be accessible and affordable to every American. All states, counties, and cities providing public transportation must be required to make their public transportation services accessible to persons with disabilities.

I would like to reiterate that the ADA transportation provision will ensure a working and viable public transportation system for all Americans. Only through accessible public transportation can people with disabilities have the freedom of movement that all other Americans take for granted.

Independent Living Centers are service centers, but they also embodiments of a philosophy. The motto of our center is "Dignity and Opportunity for People with Disabilities." Please make our motto a reality by approving the Americans with Disabilities Act of 1989 (ADA). We ask for no more, and we demand no less.

Thank you for providing me the opportunity to testify this afternoon.

Prepared Statement of Laura Oftedahl

Good Afternoon Mr. Chairman and Members of the Subcommittee:

My name is Laura Oftedahl. I am presently employed as the Director for Public Affairs of the Columbia Lighthouse for the Blind here in Washington, DC. I speak to you today as a consumer: a professional woman who is visually impaired. My work experience has included jobs in sales, broadcasting, and public relations. I have also been involved in competitive sports programs for people with disabilities, and am proud to have won national and international medals in cross country skiing. Competitive sports activities provide people with disabilities the opportunity to prove what we can do. Too often we are told that we cannot compete effectively in all aspects of life. We Can!

You might be asking yourself at this point: "It sounds like this woman has her life together! Has she experienced discrimination? Does she need the ADA?" The answer to the last question is a definite "yes!" Although I try to lead a productive, active life despite my disability, I nevertheless face barriers which the Americans with Disabilities Act will address. I have been asked to discuss primarily transportation barriers and barriers to accessing public services faced by blind or visually-impaired people. I could also easily discuss employment discrimination because I have faced that, too. My bottom line message to you is that the accommodations I need as a visually-impaired person 1133. in order to effectively access transportation and public services do not cost a lot of money, and would, for the most part, be of great benefit to the public generally.

Let me give you some real life examples. I am a regular subway rider, but for me, as a visually-impaired person, each trip requires a great deal of extra concentration. Wayfinding for a blind or visually-impaired person is a task involving all one's remaining senses. I have frequently tried to ride an escalator in the wrong direction because I could not see the sign or direction indicator. I have been disoriented when embarking from a subway car because of variations in lighting from the car's interior to the platform. While on the platform, I cannot read the directional signs, and must rely upon information from other passengers. I must always be vigilant as to where the platform edge is located. A momentary distraction, or even a casual conversation with a fellow passenger might be deadly, since I must always be aware of every orientation cue available to me. The subway platform can be particularly hazardous during the jostling of rush hour. The station environment can also be confusing because equipment such as add-fare machines or transfer dispensers are not uniformly positioned in each station.

Bus transportation can also pose a problem. I, and many of my blind or visually-impaired friends, have been late for important appointments because a bus driver failed to announce a stop, even though asked to do so. Such occurrences can cause us great embarrassment, vis-a-vis employers or prospective employers, for example. Bus transfer points where many lines converge also can be a problem, particularly at night when no one is nearby to read the signs. Features such as adequate lighting, safety strips along platform edges, readable signage, and public address systems on buses coupled with better training of vehicle operators would greatly enhance my access to public transportation. These accommodations, which I understand may be required by the ADA, are not costly, and more importantly, benefit everyone. Some of the people who have unfortunately fallen from subway platforms here in Washington have not been blind, but have been careless fully sighted individuals. Thus, safety features such as platform edge markings and adequate lighting would help not only blind or visually-impaired people, but the general public as well.

Public transportation authorities have also attempted to exclude blind people from the use of paratransit or "dial-a-ride" systems. Such discrimination is predicated on the notion that blind people can physically mount a fixed-route bus. Although a blind person without a secondary disability is perfectly capable of boarding a bus, a blind or visually-impaired person, depending upon his/her travel skills, may not be willing or able to cross a six-lane highway to reach the fixed-route bus stop. Finding the location of the fixed-route bus stop may also be difficult in some situations.

Turning to access to public services, many of the same barriers also apply. Wayfinding in public buildings can be a problem because of inadequate signage or lighting. Large open areas such as building atriums can pose significant orientation barriers. White noise created by a cascading fountain, which are popular in some new buildings may destroy the sound cues which blind and visually-impaired people rely upon for orientation and mobility.

The solution for the white noise problem is simple: building managers need only to turn the fountain's water pressure down.

Barriers to accessing public information also exist. Few agencies produce publicly distributed material in braille, large-print, recorded, or computer-accessible form. When public information is not available in special media, alternate access (such as personal assistance) is frequently not available. I recently experienced this problem when I applied for a nondriver's ID card. It was difficult for me to determine which line to stand in, and I had to rely upon another applicant to help me fill out the necessary forms. When I asked the woman who took the applications for help, she told me: "That's not my job!", and made no effort to locate a supervisor or other assistance.

Mr. Chairman, I believe that the barriers I have described above can be eliminated at minimal cost and with benefit to the general public if the ADA is enacted into law. I hope the Congress will recognize the barriers faced by all people with disabilities which impede our full participation in society. I urge you to promptly pass the Americans with Disabilities Act.

Mr. Chairman, this concludes my remarks.

TESTIMONY: SUB-COMMITTEE ON THE HANDICAPPED
DR. MARY LYNN FLETCHER, DIRECTOR DISABILITY SERVICES
LENOIR CITY, TENNESSEE

For eight (8) years of my life, I worked in rural America - from Point Barrow, Alaska, Binghamton, Maine, Glendive, Montana to Maquoketa, Iowa and Cuba, New Mexico and now in Loudon County Tennessee - I worked in rural America to provide a basic level of health care to rural citizens. Gentlemen, I know rural America: its beauty, its uniqueness and its problems.

From these experiences, I have come to realize three things: rural America is not unlike Third World Nations in some parts of our country, especially the Southeast; - secondly, rural America is facing economic girdlock; and, finally those persons who are disabled are so profoundly isolated we do not live; we exist on a slow slide into hell.

This testimony is the result of a volunteer rural health officer trying to respond to: (1) an aging population, (2) the "backlash" of mainstreaming disabled children into rural school systems, (3) the cultural myth that disability is something to fear rather than to be accommodated; (4) a system of irrational, ill-conceived and inaccessible services; and, finally to the notion a disabled person is incapable as a "social creature" and thus not part of the community - therefore, unemployable in those jobs which are available.

RURAL AREAS IN AMERICA

Most view rural America as a Currier and Ives painting - the bucolic life style where life is simple and unhurried. We all yearn to simplify our lives with the image of a rural life where one still has a special relationship with his/her land as Thomas Jefferson so elegantly envisioned over 200 years ago. But, today rural areas, especially within my beloved Southeast, are experiencing rape - rape of our resources, heritage and of it people (Dr. Ron Eller, Appalachian Center, University of Kentucky speech, "Hunger in Appalachia", Knoxville, Dec., 1987.)

I have brought some graphs to demonstrate the plight of the Southeast as well as the numbers of persons with disabilities living in rural America. It is clear where the majority of disabled persons live: the Southeast. Furthermore, there is a higher percentage of the disabled living in rural areas as compared with the general population. And, yet we have fewer resources to intervene.

You will note that over 1/3 of the "Disabled" population lives in the South.

HOW THE DISABLED PERSON IS VIEWED IN AMERICA

How America views us, the person with a disability, seems to be inexorably intertwined with the nature of ~~our~~ how we view [illegible] ourselves as Americans - a people who is self-starting, competitive, rugged individualists who deplores dependency. But, the disabled person is a violation of this image. It is almost a contradiction in terms to say a "disabled American". Society on the one hand stresses "health of mind and body"* as keys to happiness; but, on the other, society is faced with more individuals having greater functional limitations.** This paradox in attitudes has resulted in economic stagnation for the disabled community. Medical technology has outstripped and outpaced our moral and intellectual capacity to understand the needs of those whom these devices are saving. We have learned to save lives but have yet to learn to live with the results.

We, the disabled, are unlike any other minority group. We are the only ones to have the word "impairment" in our definition. There are no shared experiences, no shared culture and no pride in our uniqueness as in a Latino family. A disability, thank God, is not a matter of heritage to be passed on to the next generation, disability is a damn inconvience. Thus we are isolated within the family, the school, the community and in rural areas by a multiple of other factors.

I have tried for some time to find the means to educate the public on how profoundly isolated the person with a disability truly is. Perhaps, better than any words I could summon this illustration will denote how a disabled person feels as she/he progresses in life.

SHOW OVERLAYS: You will note that when one puts the finally overlay "rural" on top of the other isolating factors, experienced by all persons with disabilities, the person no longer exists as a social being.

One has to ask the question, therefore, given the condition of rural America and the rural person with a disability, if the Americans With Disabilities Act would affect our condition. Perhaps more than any other existing or proposed legislation, the ADA would effect our lives. The Rehabilitation Act of 1973, as amended, has had little to no influence as we in rural America receive few federal dollars.

But, first allow me to place a more human face on rural America and how the ADA would correct the benign neglect and outright discrimnation we face every day.

* ArisTotle: "Health of Mind and Body is so fundamental to the good life..."

First, let us consider who I am. I am a rural Appalachian woman who is a public health scientist and a practicing Christian. I am a person with a functional disability who because of the isolating factors identified above is sometimes "handicapped". Of all of these adjectives which ones are the more prevasive having the greater influence on my life? If I had to choose two - it would be "rural, Appalachian" and "disabled". Why? Because being from a rural and Appalachian culture affected overwhelmingly what services I received, whether I had access to my church, school, recreation and especially employment. To illustrate just one of these factors: when I graduated from the University of Tennessee in 1972, 56 employers were called by a private employment firm and all 56 employers refused even to interview me for a clerical position, although, I had had extensive experience doing clerical work while working my way through college.

But, what of today - have things chnaged? For Tennessee, for rural America, in a word, "NO"!

By all standards, I have lived and do live a privileged life: having extraordinary parents who fought and fought hard the system with no legal status at all; we had resources and a heritage of "cussed" independence. AND, yet because of horrible inaccessibility and poor construction standards, I live in agony from week to week as to how I shall be able to get my groceries or how I can gas for my car in a town where I'm not known because of the self-service gasoline stations. My recreational passion is music, especially 17th and 18th century classical music. Even when I am able to go to Knoxville to hear our orchestra, I am unable to get into the building. When I do get inside the building if I need to go to the bathroom I must crawl up a flight of stairs. My associate, Tim Craven, a senior design engineer, who is here with me today dislikes going to the University of Tennessee home basketball games with his friends for disabled persons are segregated from the able-bodied fams. The Thompson/Boling arena's construction borders on the absurd and yet this building was built last year!

We have considered collecting enough money throughout the region to send every architect from Knoxville to Atlanta back to school. And, for rural constractors we would like to send them to jail for the fraud they have imposed on individuals and local governments regarding meeting "accessibility codes."

ACCESS TO PUBLIC SERVICES

People are surprised in my region when I say, we, who are mobility impaired or sensory impaired, do not yet have the right to vote by virtue of inaccessibility. The new laws on voting, not withstanding, fully 1/3 of our polling places are totally inaccessible. The election commissions are trying but if one arrives at a polling place and that individual is unable to get inside they cannot vote on election day. To vote by absentee ballot is a long, extensive draconian process which is expensive (it requires going to a physician for a doctor's permit.) One has to want to vote more than anything to subject oneself to this humiliating process.

Another example would be: whenever Senators Jim Sasser and Albert Gore, Jr. come to Loudon County to conduct our town meetings, I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the "Court Room" In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business.

"ACCESSIBILITY STANDARDS" IN RURAL AREAS

I DO NOT BELIEVE MY URBAN BROTHERS AND SISTERS fully understand the issues we face regarding fraudulent contractors in rural areas over accessibility standards and the danger they pose.

Previously I mentioned, perhaps "tongue and cheek" what we would like to do with rural contractors. But, for the rural disabled THESE ARE REAL ISSUES. WHEN I WAS going up a ramp pitched at 38° degrees which is 10 feet long, my wheelchair flippled over backwards . I broke my fall by grabbing the railing. The end result of that fall was two ruptured discs, two surgeries with one to go at the Mayo clinic at a cost which has exceeded $200,000.

"Accessibility code fraud" is a real issue with us and, the inflated cost borders on absurd. Illustrative of this is Monroe County, Tennessee.

In Monroe county, which is next to my county, the County Commission authorized a "handicapped ramp". The Sheriff, who is a personal friend, was most anxious for me to try the new ramp. I almost fainted when I saw it - it is circular - built to circumvent over thirty (30) outdoor steps. Not could could my wheelchair, with assistance not get up the ramp, but I almost couldn't manage walking up by pulling on the railing. But at the top when I started to go into the Court House I found an "18" inch step into the court house. That piece of travesty cost Monroe county over $10,000. If only the County had consulted Tim Craven, the Tennessee Valley Authority, the state fire marshall's office we could have saved the county over $8,500.

I do not know how to suggest to handle this problem except in the enforcement area with the strong suggestion that state and local governments consult a qualified disabled person before they build or remodel a public building. These buildings are important to being enfranchased as American citizens.

COMMUNICATIONS

There is a story, one which I was unable to verify, regarding a deaf couple who lives in the upper portion of our county whose home almost burned to the ground because the central dispatching does not have a TDD for communications with the deaf. WHAT I can verify is that there is not one TDD in any government office within my county as well as most rural, Tennessee counties. There is not even a devise at our rural hospital nor interrputor services and they receive federal funds.

EMPLOYMENT

In most rural areas there are five consistent employers: the school system, the city and county government, rural hospitals (if we've lucky enough to keep them after this Congress) and banks.

I do not even know where to begin explaining how truly discrimnatory these institutions truly are. Of those counties lucky enough to have industry as we do "hiring the handicapped" is a joke.

I work every day of my life on employment issues and the only consistent place I can refer qualified people to are the Tennessee Valley Authority and the Oak Ridge National Laboratories, both substantial distances from my home. These, of course, receive federal funding and thus are accountable. Of the private industries only one makes a concerted effort to outreach to the disabled person: Martin Marietta Energy Systems, but again they are federally funded and the President, Mr. Clyde Hopkins is on the Executive Committee for the President's Committee for the Employment of the Disabled Person.

I can tell you of an instance where a person worked for a company for 19 years and then was fired because he developed a disability which did not interfer with his job. I can tell you of people with epilesy who have had one seizure after working for years and then being fired - this happened in my own family.

Some of the other issues I have mentioned are usually as a result of benign neglect but in the area of employment - the problems regarding employment are examples of gross discrimnation largely based upon ignorance about insurance and the capabilities of the disabled person.

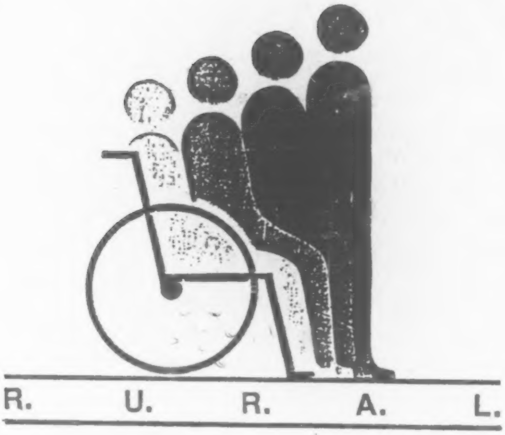
I am thrilled to see organized labor now on the National Council on the Handicapped for their people are the taking the greatest beating over discrimnation when one of their workers acquire a disability.

Finally, Senators, I would strongly urge you to "stick to your guns" over the financial enalties which you are proposing for industry - because without them we will have no opportunity to employ the disabled in rural America.

Take any aspect of the American with Disabilities Act and the proposed coverage it would entail and I would be able to give you horror stories. I keep asking myself, is it not time, in this year of the Bicentennial of the Congress of the United States that American's largest minority group become enfranchised?

We have tried for over sixty years to change people's atitudes but America is afraid becoming disabled and thus dependent. Therefore, most would like to ignore these problems. Until basic civil liberities are a "right" rather than a "privilege" the person with a disability will remain an object of charity. A people diminished before the law is diminished before society. Until there are strong laws the person with a disability will remain isolated, or as Gliedman and Roth noted in their book The Unexpected Minority (written for the Carneige Foundation on Children) "an isolate and thus socially incompetent or in the original Greek meaning of the word 'handicapped', an idiot."

Isolation : Disabled Person



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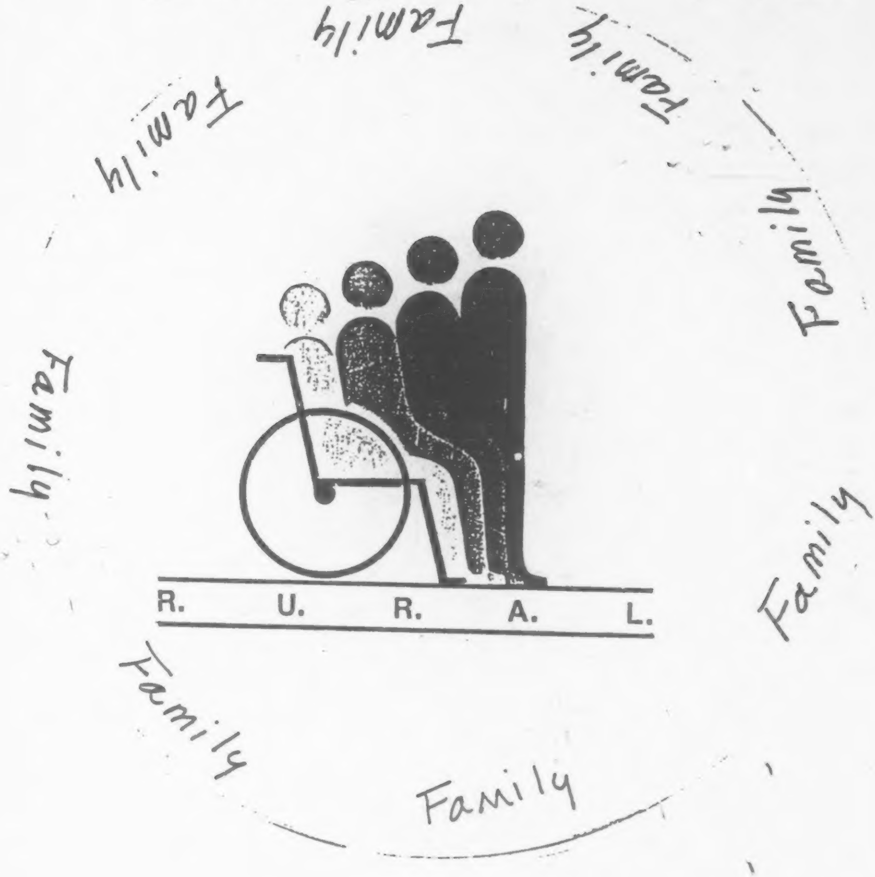
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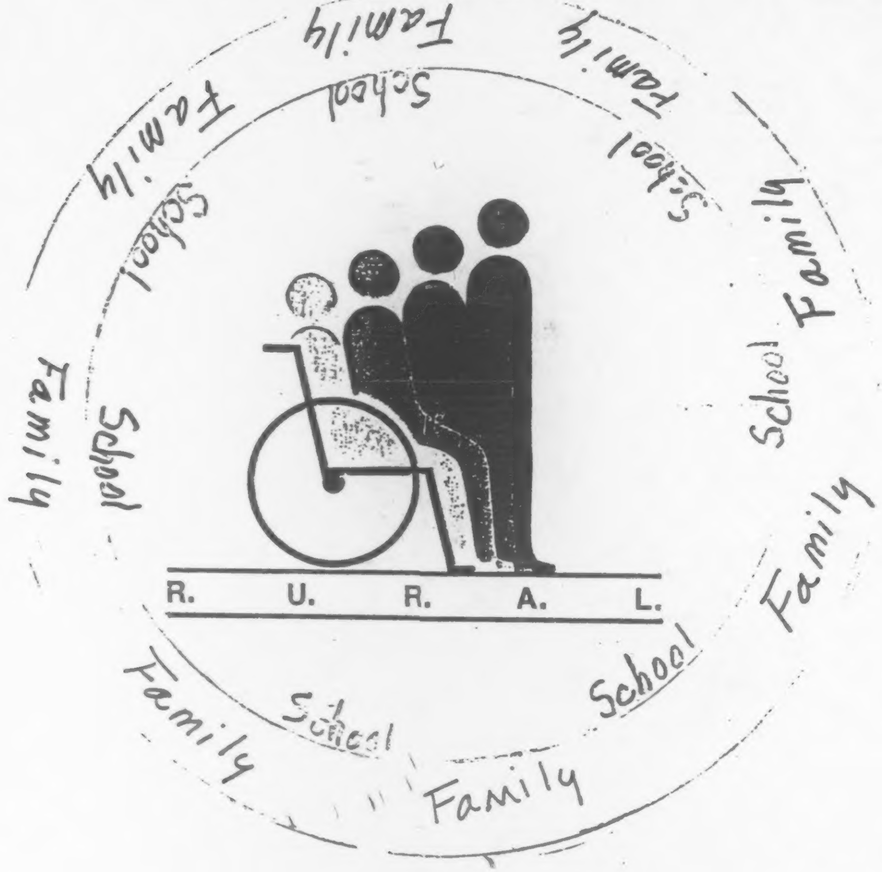
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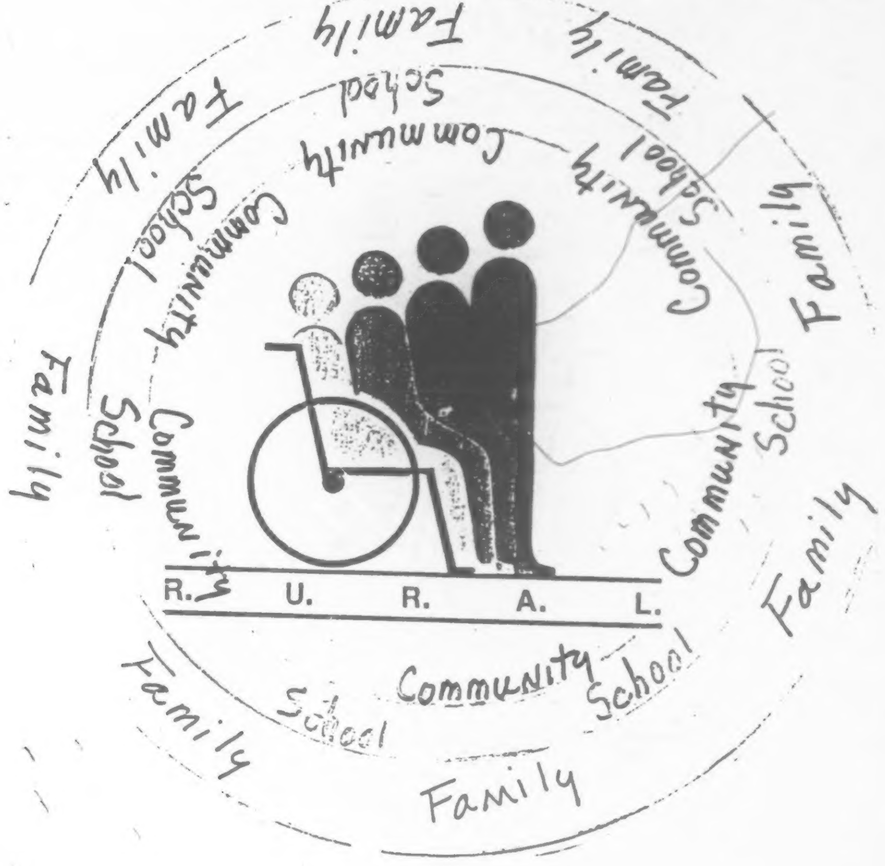
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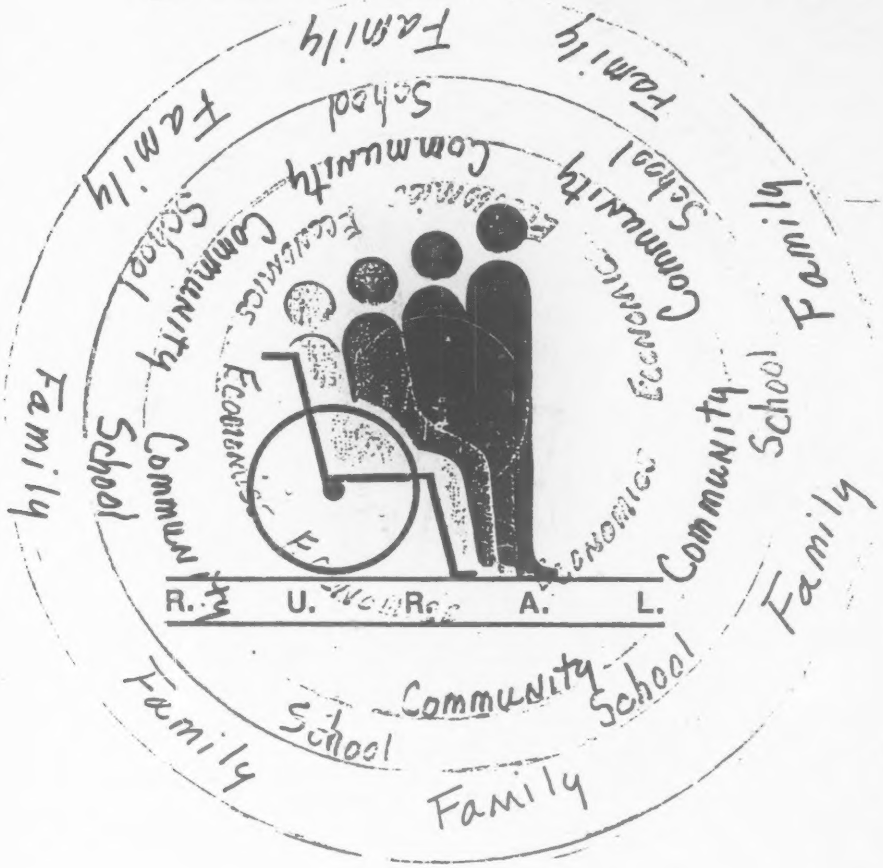
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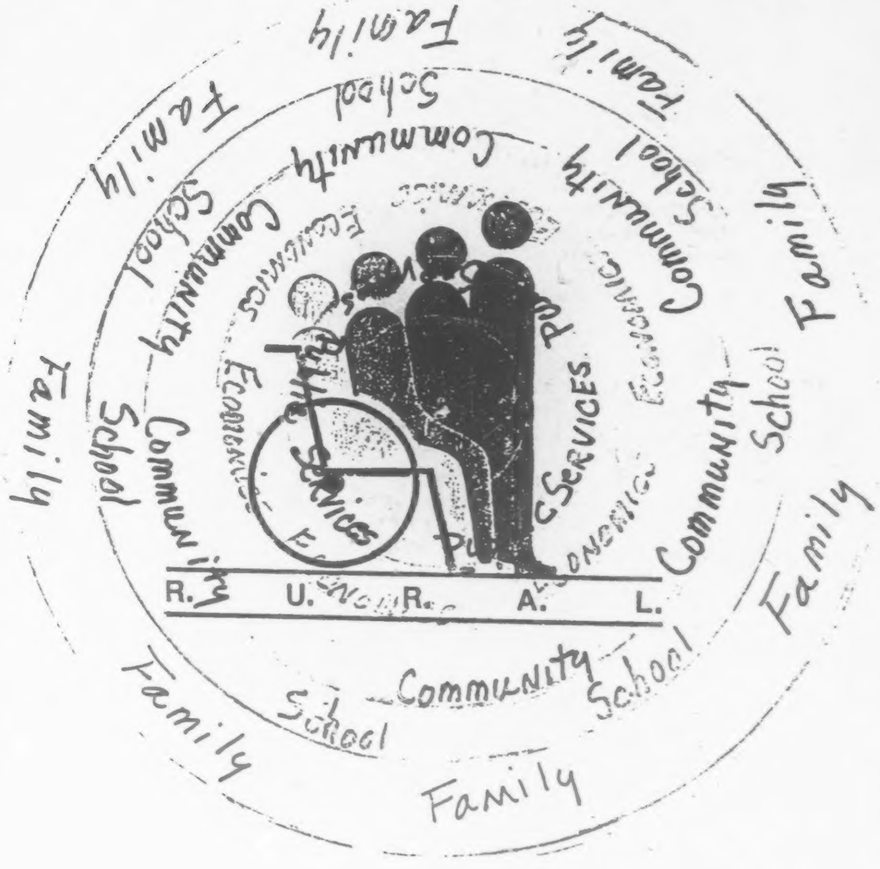
Isolation : Disabled Person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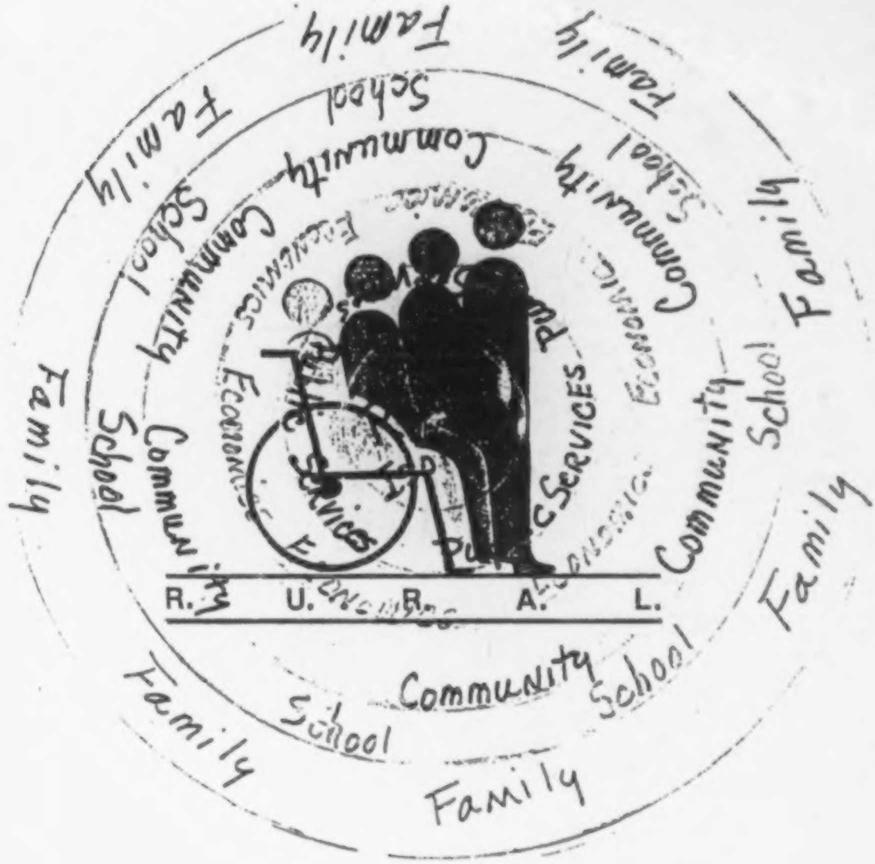
Isolation : Disabled Person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TESTIMONY
BY
MARK JOHNSON
AMERICAN DISABLED FOR ACCESSIBLE PUBLIC TRANSPORTATION (ADAPT)

SOME FACTS

THIS YEAR IS THE 25TH ANNIVERSARY OF THE URBAN MASS TRANSPORTATION ACT, 16TH ANNIVERSARY OF SECTION 504 AND 10TH ANNIVERSARY OF THE ORIGINAL MANDATE TO MAKE TRANSIT TOTALLY ACCESSIBLE TO PEOPLE WITH DISABILITIES.

FEDERAL FUNDING FOR PUBLIC TRANSIT WAS REDUCED FROM $4,615 MILLION IN 1981 TO $3,215 IN 1988.

IN SPITE OF THESE CUTS, THE NUMBER OF LIFT EQUIPPED BUSES HAS INCREASED FROM 11% IN 1981 TO OVER 31% IN 1988.

38% OF U.S. TRANSIT SYSTEMS PROVIDE BOTH FIXED ROUTE ACCESS AND PARATRANSIT SERVICES.

CALIFORNIA LEAD THE WAY WITH LEGISLATION IN 1971.

SEATTLE'S METRO MADE A COMMITMENT TO TOTAL ACCESS IN 1978.

BY *1991*, DENVER'S ENTIRE FLEET OF OVER 700 FIXED ROUTE BUSES WILL BE LIFT EQUIPPED. IN ADDITION, DENVER OPERATES A PARATRANSIT SERVICE.

MIAMI VALLEY REGIONAL TRANSIT AUTHORITY, DAYTON OHIO, USES A THREE-PRONG APPROACH; FIXED ROUTE ACCESS, ACCESSIBLE VANS AND TAXIS SERVICES OPERATED BY THE PRIVATE SECTOR. IN ADDITION, MVRTA IS INVOLVED IN INTERAGENCY COORDINATION INITIATIVES.

THE DEPARTMEMT OF TRANSPORTATION (DOT), IN A ONE PAGE SUMMARY, DATED *JUNE 9, 1980*, HIGHLIGHTED THE REASONS FOR THE ACCESSIBILITY APPROACH UNDERLYING THE DEPARTMENT'S ORIGINAL REGULATION IMPLEMENTING 504.

"WHEN THE DEPARTMENT OF TRANSPORTATION PROVIDES GRANTS FOR THE OPERATION OF MASS TRANSIT SYSTEMS, HANDICAPPED PERSONS SHOULD BE ABLE TO USE SUCH MAINLINE SYSTEMS."

"MOREOVER, IT IS MUCH LESS EXPENSIVE AND MORE COST-EFFECTIVE TO MAKE EXISTING TRANSPORTATION SYSTEMS ACCESSIBLE TO HANDICAPPED PERSONS THAN IT IS TO CREATE SEPARATE, SPECIAL SYSTEMS."

DOT CONCLUDED THAT PERMITTING A SPECIAL-SERVICE-ONLY APPROACH WOULD NECESSITATE "SIGNIFICANT REGULATORY AND ENFORCEMENT EFFORTS."

IN AN *AUGUST 14TH, 1988* CORRESPONDENCE TO MARCA BRISTO, GEORGE BUSH STATED:

"WE ARE AWARE THAT IF THE EMPLOYMENT POTENTIAL OF PEOPLE WITH DISABILITIES IS FULLY REALIZED, PARATRANSIT SERVICES SIMPLY WILL NOT BE ABLE TO ACCOMMODATE THE NUMBERS INVOLVED."

ON *FEBRUARY 13TH, 1989*, A FEDERAL APPEALS COURT ORDERED THE U.S. DEPARTMENT OF TRANSPORTATION TO REQUIRE TRANSIT AUTHORITIES TO EQUIP ALL NEWLY PURCHASED BUSES WITH LIFTS AND PROVIDE PARATRANSIT SERVICES.

FANTASY

-THINGS COULDN'T BE BETTER.

-ACCESS ONLY EFFECTS OR BENEFITS PEOPLE WITH DISABILITIES.

-PUBLIC PARTICIPATION AS OUTLINED IN THE CURRENT REGULATIONS WORKED AND IS WORKING.

REALITY

MOST PEOPLE WITH DISABILITIES DON'T HAVE ACCESS TO PRIVATE TRANSPORTATION.

IF THE ORIGINAL MANDATE HAD REMAINED IN EFFECT, EVERY BUS IN THE COUNTRY WOULD HAVE BEEN LIFT-EQUIPPED BY 1991.

INSTEAD INCONSISTENCY IN APPROACH, COURT ACTION AND CONTROVERSY CONTINUE.

CHICAGO TRANSIT AUTHORITY WAS FORCED THROUGH LITIGATION TO PROVIDE ACCESS.

THE CITY OF PORTLAND WAS FORCED THROUGH LITIGATION.

THE CITY OF DETROIT WAS HIT WITH $2.1 MILLION JUDGMENT FOR FAILURE TO PROVIDE ACCESSIBLE BUS TRANSPORTATION. SIX PEOPLE WITH DISABILITIES FILED THE ORIGINAL LAWSUIT. THE NUMBER OF PLAINTIFFS HAS GROWN TO 1,100.

CINCINNATI'S QUEEN CITY METRO BOUGHT 87 LIFTED-EQUIPPED BUSES IN 1981, OVER 100 IN 1986 (OVER HALF THE FLEET IS NOW LIFT-EQUIPPED), BUT METRO DOESN'T CHOOSE TO USE THEIR LIFTS. IT'S THEIR OPTION AND IT'S LEGAL.

They are bolted & non-operatiab

IN TULSA, OK, THE SYSTEM TRIED TO CONTROL RIDERSHIP ON THEIR PARATRANSIT-ONLY SERVICE BY INCREASING FARES.

WASHINGTON, D.C. METRO'S 50% IS AN INSULT.

ATLANTA, GA, COMMITTED TO 100% IN 1987, HOWEVER IT WILL BE THE YEAR 2,000, (27 YEARS AFTER THE PASSAGE OF 504) BEFORE I CAN RIDE THE SAME BUSES YOU DO.

I'M NOT AWARE OF ANY CITY WHOSE PARATRANSIT-ONLY APPROACH ACCOMMODATE'S OUT-OF-TOWN GUESTS.

CLEARLY LOCAL OPTION MEANS NO OPTION.

CLEARLY UNEMPLOYMENT OF PEOPLE WITH DISABILITIES WILL REMAIN UNACCEPTABLY HIGH UNTIL TRANSIT IS TOTALLY ACCESSIBLE.

CLEARLY ACTION SPEAKS LOUDER THAN WORDS.

WHEN ACCEPTING HIS PARTY'S NOMINATION FOR PRESIDENT, GEORGE BUSH SAID:

"I'M GOING TO DO WHATEVER IT TAKES TO MAKE SURE THE DISABLED ARE INCLUDED IN THE MAINSTREAM. FOR TOO LONG THEY'VE BEEN LEFT OUT, BUT THEY ARE NOT GOING TO BE LEFT OUT ANY MORE."

ON *APRIL 10TH, 1989,* THIS ADMINISTRATION FILED A PETITION TO REHEAR A CASE ORDERING ALL NEW TRANSIT BUSES TO BE LIFT-EQUIPPED AND PARATRANSIT SERVICES PROVIDED.

SOME OF US IN THIS ROOM JUST RETURNED FROM PHILADELPHIA, WHERE ORAL ARGUMENTS WERE PRESENTED.

CLEARLY WE NEED TO MANDATE ACCESS IN THE PUBLIC AND PRIVATE SECTOR.

NONE OF GREYHOUNDS BUSES, OVER 4,000 HAS A LIFT. INSTEAD THEY HAVE THEIR "HELPING HANDS" PROGRAM. OTHERWISE YOU BRING SOMEONE TO CARRY YOU ON AND THEN THEY CAN REFUSE TO TRANSPORT YOUR BATTERY POWERED WHEELCHAIR.

ACCESSIBLE HOTEL SHUTTLES FROM AIRPORTS DON'T EXIST.

AND WHEN'S THE LAST TIME YOU TOOK A TRIP ON AN ACCESSIBLE CHARTER BUS.

MY/ADAPT'S COMMITMENT

IN 1981, I MADE A COMMITMENT TO THE STRUGGLE FOR ACCESSIBLE PUBLIC TRANSPORTATION. I WAS ARRESTED IN 1982 FOR CHAINING MYSELF TO A RAIL IN THE LOBBY OF THE DENVER'S REGIONAL TRANSIT DISTRICT'S ADMINISTRATIVE OFFICES, BECAUSE THEY DIDN'T WANT TO PROVIDE ACCESSIBLE EXPRESS SERVICE. SOME OF US IN THIS ROOM HAVE BEEN ARRESTED REPEATLY, SINCE 1983, BECAUSE THE AMERICAN PUBLIC TRANSIT ASSOCIATION DENIES US OUR RIGHT TO FREEDOM AND DIGNITY. WE WILL CONTINUE OUR EFFORTS. WE WILL RIDE.

BEING PART OF THE SOLUTION

YOU MUST ACT SWIFTLY AND RIGHTEOUSLY TO ENACT THE AMERICANS WITH DISABILITIES ACT AND YOU MUST STOP THE DEPARTMENT OF JUSTICE FROM APPEALING THE THIRD CIRCUIT'S DECISION TO MANDATE TOTAL ACCESS TO PUBLIC TRANSIT.

TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES

907 6th Street, S.W., Suite 516C, Washington, D.C. 20024
(202) 488-7684 Voice (202) 484-1370 TDD

Appointed by Congressman Major R. Owens, Chairman, House Subcommittee on Select Education

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May 16, 1989

Dear Senator Harkin —

You have read a statement by a witness on the subject of the transportation rights of people with disabilities that "people with disabilities overwhelmingly prefer paratransit". The implication seems to be that they prefer paratransit and oppose accessible public transit.

Last year I presided at 63 public forums in all 50 states where more than

8000 persons with disabilities and their advocates participated to express their views on ADA.

I do not recall one single individual who stated a preference for para transit in the sense that public transportation should not be required to be 100% accessible.

I recall virtually unanimous support for 100% accessible public transit, with paratransit as a supplement.

Sincerely

Justin Dart

Motion by Justin Dart;

That the following statement be released immediately by the Council and communicated forthwith to the the President, members of Congress who are involved with ADA negotiations, appropriate entities in the disability community and the public media.

May 15, 1989

For immediate release

The National Council on Disability commends the Congressional Sponsors of the Americans with Disabilities Act of 1989, and all who are making efforts to provide comprehensive civil rights protection to Americans with disabilities. It is imperative for the integrity and economy of the nation that Congress pass and the President sign legislation that will ensure the protection and enforcement of the civil rights of all people with disabilities to participate fully and equally in the mainstream of society. Recognizing that there are honest differences of opinion among interested parties as to how best to achieve the agreed upon goal of comprehensive civil rights legislation, the Council urges painstaking negotiations to achieve that bipartisan Congressional and executive branch unity which will be essential to the effective implementation of this historic legislation. The Council also urges that any modifications of the Act resulting from such negotiations clarify or enhance, rather than weaken, the strong protections against discrimination to which persons with disabilities are entitled, as recommended by this body on many previous occasions.

Prepared Statement of J. Roderick Burfield

GOOD AFTERNOON, MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. MY NAME IS J. RODERICK BURFIELD. I APPEAR BEFORE YOU TODAY AS AN OFFICER AND SPOKESMAN FOR THE VIRGINIA ASSOCIATION OF PUBLIC TRANSIT OFFICIALS (VAPTO). MY REMARKS TODAY REPRESENT THE POSITION OF THE VIRGINIA ASSOCIATION OF PUBLIC TRANSIT OFFICIALS AND DO NOT REPRESENT THE POSITION OF MY EMPLOYER, THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY.

PUBLIC TRANSIT IN VIRGINIA FOR THE DISABLED

VAPTO CONSISTS OF 20 TRANSIT PROPERTIES THAT CARRY OVER 98 PERCENT OF THE ANNUAL PUBLIC TRANSIT RIDERSHIP IN VIRGINIA AND ALSO MANAGES A TRANSIT LIABILITY INSURANCE POOL FOR ITS MEMBERS. ASSOCIATE MEMBERS INCLUDE HUMAN AND SOCIAL SERVICE AGENCIES AND TRANSIT CONSULTANTS AND VENDORS.

VAPTO'S MEMBERSHIP CONSISTS OF LARGE URBAN TRANSIT PROPERTIES (WASHINGTON, D.C. AND ITS VIRGINIA SUBURBS); MEDIUM URBAN TRANSIT PROPERTIES (TIDEWATER VIRGINIA; NEWPORT NEWS AND HAMPTON; ROANOKE; LYNCHBURG; CHARLOTTESVILLE; PETERSBURG); SMALL URBAN TRANSIT PROPERTIES (HARRISONBURG; BRISTOL; DANVILLE; WINCHESTER); AND RURAL SYSTEMS OF VARYING SIZES AND

CHARACTERISTICS (BLACKSBURG; JAMES CITY COUNTY; CENTRAL VIRGINIA TRANSPORTATION; JEFFERSON AREA UNITED TRANSPORTATION). THE MIX OF SIZE AND TYPE OF SYSTEM (URBAN; SUBURBAN; RURAL; BUS; VANS; RAIL; FERRY) IN VIRGINIA IS TYPICAL OF MANY STATES. VIRGINIA MAY BE VIEWED AS A SAMPLE OF THE VARIOUS METHODS THAT HAVE BEEN DEVELOPED TO MAKE PUBLIC TRANSIT AVAILABLE TO DISABLED PERSONS UNDER EXISTING FEDERAL AND STATE STATUTES.

THERE ARE ESSENTIALLY TWO TYPES OF SERVICE OFFERED TO DISABLED TRANSIT USERS: (1) FIXED ROUTE, LIFT EQUIPPED BUSES ON A FULLY ACCESSIBLE OR DEMAND RESPONSE BASIS, AND (2) PARATRANSIT OR SPECIAL TRANSPORTATION SERVICE, WHICH IS USUALLY A DEMAND RESPONSE, SPECIALLY EQUIPPED VAN NOT CONFINED TO A FIXED ROUTE AND THEREFORE MORE FLEXIBLE IN ITS APPLICATION. THE VAST MAJORITY OF PUBLIC TRANSIT FOR DISABLED PERSONS IS ONE OF THESE METHODS OR A COMBINATION OR VARIATION OF THEM.

VAPTO STRONGLY SUPPORTS ACCESSIBLE PUBLIC TRANSIT SERVICES FOR THE DISABLED COMMUNITY. IN 1988, VAPTO MEMBERS SPENT OVER $11 MILLION AND CARRIED OVER 815,000 DISABLED PASSENGER TRIPS (SEE ATTACHMENT). ALSO IN 1988, USING A NEW FINANCIAL INCENTIVE PROGRAM THAT PROVIDES A HIGHER LEVEL OF CAPITAL ASSISTANCE FOR EQUIPMENT THAT SERVES THE DISABLED, VIRGINIA'S TRANSIT SYSTEMS SPENT ALMOST $1.8 MILLION TO INITIATE OR SUBSTANTIALLY IMPROVE TRANSPORTATION FOR THE DISABLED (SEE ATTACHMENT).

IN VIRGINIA, THREE TRANSIT PROPERTIES PROVIDE LIFT EQUIPPED SERVICE EXCLUSIVELY; 12 PROVIDE PARATRANSIT SERVICE EXCLUSIVELY; TWO PROPERTIES PROVIDE BOTH; AND FOUR PROPERTIES OPERATE IN AREAS WHERE BOTH SERVICES ARE AVAILABLE, BUT ARE OPERATED BY DIFFERENT AGENCIES. EIGHT OF THESE PROPERTIES, IN RECOGNITION OF THE OBLIGATION TO SERVE DISABLED PERSONS, VOLUNTARILY EXCEED THE MINIMUM THREE PERCENT ANNUAL OPERATING COST GUIDELINES REQUIRED IN THE EXISTING UMTA REGULATIONS.

EXPERIENCE IN VIRGINIA

THE IMPROVEMENTS IN TRANSPORTATION SERVICES FOR DISABLED PERSONS THAT S. 933 SEEKS TO MANDATE ARE LAUDABLE. THE REAL-LIFE, REAL-TIME EXPERIENCES THAT HAVE OCCURRED OVER THE LAST DECADE, HOWEVER, LEAD VIRGINIA TRANSIT PROPERTIES TO THE CONCLUSION THAT THIS BILL AS CURRENTLY DRAFTED WILL INEVITABLY FALL PREY TO THE 'LAWS OF UNINTENDED CONSEQUENCES'. TYPICALLY, A REVIEW OF THE EFFECTS A BILL SEVERAL YEARS LATER REVEALS THAT CHANGES DID OCCUR, BUT THE BEHAVIOR MODIFICATION WAS NOT AS GREAT AS ORIGINALLY INTENDED OR THE CHANGED BEHAVIOR DID NOT OCCUR IN THE MANNER IN WHICH IT WAS ORIGINALLY CONCEIVED. NOT SURPRISINGLY, SOME OF THE MANDATED CHANGES USUALLY CREATE OR RESULT IN AN UNINTENDED SITUATION THAT IS WORSE THAN THE SITUATION PRIOR TO PASSAGE OF THE OMNIBUS BILL.

IN THIS INSTANCE, THE CONGRESS, THE DISABLED COMMUNITY AND TRANSIT PROPERTIES NATIONWIDE HAVE A RARE OPPORTUNITY TO FORECAST WITH SOME ACCURACY ALMOST PRECISELY WHAT SOME OF THESE UNINTENDED CONSEQUENCES COULD BE. THIS IS BECAUSE FEDERAL STATUTES AND REGULATIONS ON THE ISSUE OF PUBLIC TRANSIT ACCESSIBILITY FOR THE DISABLED HAVE BEEN DEALT WITH AT THE LOCAL LEVEL FOR OVER 10 YEARS. A RECORD OF THE SUCCESSES AND FAILURES HAS BEEN WELL ESTABLISHED.

VAPTO MEMBERS HAVE HAD AN EXTREMELY POSITIVE EXPERIENCE WORKING COOPERATIVELY WITH THE LOCAL DISABLED AND TRANSIT COMMUNITY AND TAKING INTO ACCOUNT UNIQUE LOCAL CONDITIONS. I OFFER SOME INFORMATION AND RECENT EXPERIENCES IN VIRGINIA FOR THE SUBCOMMITTEE'S CONSIDERATION:

S. 933 REQUIRES THAT FIXED ROUTE VEHICLES PURCHASED WITHIN 30 DAYS AFTER ENACTMENT OF THE BILL BE WHEELCHAIR ACCESSIBLE.

- O IN JAMES CITY COUNTY, VIRGINIA, WHICH SURROUNDS THE CITY OF WILLIAMSBURG, LESS THAN ONE PERCENT OF THE ROADS HAVE SIDEWALKS. A REQUIREMENT THAT JAMES CITY COUNTY LIFT EQUIP THEIR BUSES WOULD CLEARLY NOT SERVE THE DISABLED, SINCE A WHEELCHAIR-BOUND PERSON COULD NOT SAFELY GET TO THE BUS STOP. THIS IS WHY JAMES CITY COUNTY HAS A PARATRANSIT SYSTEM TO SERVE DISABLED PERSONS AND SPENT 25 PERCENT OF THEIR TRANSIT OPERATING BUDGET FOR THIS PURPOSE IN 1988. JAMES CITY COUNTY, BY THE WAY, HAS NEVER RECEIVED A COMPLAINT BECAUSE THEIR BUSES ARE NOT LIFT EQUIPPED.

- O LYNCHBURG, VIRGINIA IS A CITY OF 70,000 SITUATED ON EXTREMELY HILLY TERRAIN. MANY LOCATIONS WOULD BE LITERALLY IMPOSSIBLE FOR WHEELCHAIR PATRONS TO GET TO AND EVEN MORE DIFFICULT TO OPERATE A LIFT EQUIPPED BUS. FOR THIS REASON, LYNCHBURG OPERATES A PARATRANSIT SYSTEM FOR DISABLED PERSONS.

- O WINCHESTER AND HARRISONBURG, VIRGINIA, BOTH PURCHASED LIFT EQUIPPED BUSES IN THE EARLY 1980'S AND OPERATED THEM IN REGULAR ROUTE SERVICE FOR SEVERAL YEARS. WHEN NOBODY USED THEM, THEY WERE PHASED OUT AND BOTH CITIES TODAY OPERATE PARATRANSIT SYSTEMS.

- O BLACKSBURG, VIRGINIA IS THE HOME OF THE LARGEST STATE UNIVERSITY, VIRGINIA TECH. THE TOWN OPERATES A 25-BUS, FIXED ROUTE TRANSIT SYSTEM THAT SERVES THE TOWN AND THE 25,000 STUDENTS. THE TOTAL NUMBER OF QUALIFIED DISABLED PERSONS IS APPROXIMATELY 60. THEY ARE SERVED BY A PARATRANSIT SYSTEM WHICH THEY HAD A LARGE HAND IN DESIGNING.

- O EVEN IN THE LARGEST AND MOST DENSELY POPULATED URBAN AREAS, LESS THAN 10 PERCENT OF THE BUS STOPS HAVE SHELTERS AND LESS THAN HALF OF THE BUS STOPS HAVE A HARD SURFACE ON WHICH RIDERS MAY STAND. JUST RECENTLY IN VIENNA, VIRGINIA, AN ASPHALT PAD WAS INSTALLED BETWEEN THE SIDEWALK AND THE CURB SO A WHEELCHAIR BUS RIDER WOULD NOT SINK INTO THE GRASS WHEN ATTEMPTING TO BOARD A LIFT-EQUIPPED BUS.

RESPONSIBLE SERVICE DELIVERY

S. 933 REQUIRES THAT ANY SYSTEM THAT PROVIDES LIFT EQUIPPED, FIXED ROUTE TRANSIT SERVICES MUST, IN ADDITION, PROVIDE PARATRANSIT SERVICES FOR THE DISABLED "SUFFICIENT TO PROVIDE A COMPARABLE LEVEL OF SERVICES AS IS PROVIDED TO INDIVIDUALS USING FIXED ROUTE PUBLIC TRANSPORTATION."

- IN ALL RURAL AREAS AND IN SOME URBAN AREAS IN VIRGINIA, PARATRANSIT SERVICES ARE PROVIDED BY HUMAN AND SOCIAL SERVICE AGENCIES INSTEAD OF THE PUBLIC TRANSIT AGENCY. AS DRAFTED, THE LEGISLATION DOES NOT MAKE IT CLEAR THAT PARATRANSIT SERVICES PROVIDED BY ONE AGENCY AND FIXED ROUTE PUBLIC TRANSPORTATION PROVIDED BY ANOTHER IS ALLOWABLE.

- IF ALLOWING ONE AGENCY TO PROVIDE FIXED ROUTE SERVICES AND ANOTHER TO PROVIDE PARATRANSIT SERVICES IS PERMISSIBLE, THE BEST RESULT IS THAT THE PARATRANSIT AGENCY MUST NOW COMPLY WITH TWO SETS OF FEDERAL AND/OR STATE AND/OR LOCAL REGULATIONS, REPORT TO TWO BUREAUCRACIES, COMPLICATE THE DELIVERY OF SERVICES AND INCREASE OPERATING COSTS.

- THE WORST RESULT IS THAT A LOCAL TURF BATTLE TORPEDOES THE COMBINATION OF THE FIXED ROUTE AND PARATRANSIT SYSTEMS, SO THAT THE TRANSIT AGENCY IS FORCED TO CREATE A SECOND, OVERLAPPING PARATRANSIT SYSTEM AT GREAT ADDITIONAL COST AND NEGLIGIBLE ADDITIONAL BENEFIT. IN THIS INSTANCE, A FIXED ROUTE BUS SYSTEM AND TWO PARATRANSIT SYSTEMS WOULD CONSUME SCARCE FEDERAL, STATE AND LOCAL DOLLARS AS THE PUBLIC SUBSIDIZES THREE PUBLIC TRANSIT SYSTEMS INSTEAD OF JUST ONE.

S. 933 DOES NOT ADDRESS THE ISSUE OF "DUMPING" IN ANY WAY. "DUMPING," OR THE ABANDONMENT OF CLIENT TRANSPORTATION BY HUMAN AND SOCIAL SERVICE AGENCIES HAS BEEN OCCURRING IN VIRGINIA AND NATIONWIDE FOR SOME TIME. VAPTO BELIEVES THAT S. 933 WILL ACCELERATE THIS TREND BECAUSE OF THE REQUIREMENT THAT TRANSIT AGENCIES THAT OPERATE FIXED ROUTE SERVICES ALSO OPERATE PARATRANSIT SERVICES.

O "DUMPING" HAS BEEN OCCURRING ACROSS THE COUNTRY FOR SEVERAL YEARS AND IS ACCELERATING BECAUSE OF REDUCED FUNDING FOR SOCIAL SERVICE PROGRAMS. BASICALLY, THIS PHENOMENON OCCURS WHEN THE SOCIAL SERVICE AGENCY CONTACTS THE MASS TRANSIT PROVIDER AND INFORMS THEM THAT THEY WILL

NO LONGER BE ABLE TO TRANSPORT THEIR CLIENTELE. THE SOCIAL SERVICE AGENCY USUALLY FURTHER STATES THAT THE MASS TRANSIT AGENCY, UNDER CURRENT UMTA REGULATIONS AND SECTION 504 OF THE REHABILITATION ACT OF 1973, IS RESPONSIBLE FOR OPERATING THE TRANSIT SERVICE FOR THEIR SOCIAL SERVICE CLIENTS. THE SOCIAL SERVICE AGENCY DOES NOT NORMALLY TRANSFER ANY FUNDS IN ORDER TO PAY FOR THE INCREASED EXPENSES OF THE MASS TRANSIT AGENCY, SINCE THE "DUMPING"

OCCURRED SO THEY COULD REPROGRAM THEIR TRANSPORTATION FUNDS TO OTHER PURPOSES. IN MANY INSTANCES, THE ADDITIONAL SERVICE REQUIRED BECAUSE OF THE "DUMPING" IS NOT ELIGIBLE FOR FEDERAL OR STATE OPERATING ASSISTANCE BECAUSE IT IS NOT FIXED ROUTE "PUBLIC" TRANSPORTATION. (ATTACHED TO THIS STATEMENT IS A 1988 LETTER TO THE GREATER RICHMOND TRANSIT COMPANY (GRTC) THAT ILLUSTRATES HOW DUMPING OCCURS.)

O IN OTHER INSTANCES OF "DUMPING", A SOCIAL SERVICE AGENCY CEASES TO OPERATE THEIR OWN TRANSPORTATION SYSTEM OR CANCELS THE CONTRACT WITH THE MASS TRANSIT SYSTEM AND SIMPLY TELLS THEIR CLIENTS WHAT BUSES THEY MUST TAKE OR HOW TO ORDER A PARATRANSIT VEHICLE. THIS IS A MORE SUBTLE FORM OF "DUMPING", SINCE FREQUENTLY THE MASS TRANSIT AGENCY IS NOT NOTIFIED OF THE ACTION OF THE SOCIAL SERVICE AGENCY BEFORE IT OCCURS. UNFORTUNATELY, THE SOCIAL SERVICE CLIENT MAY NOT LIVE CLOSE TO THE BUS STOP, FREQUENTLY MUST TRANSFER VEHICLES OR DOES NOT COMPLETELY UNDERSTAND HOW TO USE THE BUS OR PARATRANSIT SERVICE. THE RESULT: SOCIAL SERVICES ARE DENIED TO CITIZENS MOST IN NEED OF THEM.

O A MAJOR PROBLEM THAT OCCURS IS THAT SOME OF THE SOCIAL SERVICE CLIENTS WHO ARE "DUMPED" ARE NOT CLASSIFIED AS DISABLED UNDER CURRENT STATUTES OR UNDER THE DEFINITIONS CONTAINED IN S. 933. WHAT HAPPENS TO THE ELDERLY? WHAT HAPPENS TO DIALYSIS PATIENTS? WHAT HAPPENS TO HOMELESS PERSONS OR DRUG AND ALCOHOL REHABILITATION PATIENTS? THESE PERSONS ARE SERVED BY SOCIAL SERVICE AGENCIES BUT FREQUENTLY DO NOT MEET THE DEFINITION OF DISABLED UNDER THE LAW.

O THE PROVISION IN S. 933 REQUIRING COMPARABLE PARATRANSIT SERVICE COULD LEAD TO SERVICE THAT IS INFERIOR TO EXISTING SERVICE LEVELS. LET US ASSUME THAT A MASS TRANSIT AGENCY CURRENTLY OPERATES A PARATRANSIT SYSTEM FOR DISABLED PERSONS BUT DOES NOT HAVE LIFT EQUIPPED REGULAR ROUTE BUSES. UNDER THE PROPOSED STATUTE, THE MASS TRANSIT SYSTEM WOULD BE REQUIRED TO LIFT EQUIP ALL NEW BUSES AND PROVIDE PARATRANSIT COMPARABLE TO THE REGULAR ROUTE BUS SERVICE. COMPARABLE SERVICE DEFINED IN THIS MANNER WOULD MEAN PARATRANSIT SERVICE CONFINED TO DESIGNATED REGULAR BUS ROUTES AND SCHEDULES AT NIGHT AND ON WEEKENDS. MOST

EXISTING PARATRANSIT SYSTEMS PROVIDE SUPERIOR LEVELS OF SERVICE TO THAT ENJOYED BY REGULAR ROUTE RIDERS -- THE PARATRANSIT VEHICLES ARE NOT CONFINED TO REGULAR BUS ROUTES, OPERATE ON A DEMAND RESPONSE BASIS THROUGHOUT THE ENTIRE SERVICE AREA AND PROVIDE CURB-TO-CURB OR DOOR-TO-DOOR SERVICE WITH TRAINED DRIVERS. THE PROPOSED STATUTE WOULD ALLOW THIS SERVICE TO BE REDUCED TO THE LESSER LEVEL PROVIDED TO REGULAR BUS RIDERS.

O NATIONAL RIDERSHIP STATISTICS INDICATE THAT THE DISABLED OVERWHELMINGLY PREFER PARATRANSIT SERVICE. IN VIRGINIA, RICHMOND AND THE NORTHERN VIRGINIA AREA OFFER BOTH PARATRANSIT AND LIFT SERVICE. IN RICHMOND IN 1988, ONE LIFT EQUIPPED TRIP WAS TAKEN FOR EVERY 59 PARATRANSIT TRIPS. IN NORTHERN VIRGINIA IN 1988, ONE LIFT EQUIPPED TRIP WAS TAKEN FOR EVERY 37 PARATRANSIT TRIPS. RATIOS LIKE THIS ARE REPEATED IN VIRTUALLY EVERY AREA NATIONWIDE IN WHICH BOTH METHODS OF TRIP DELIVERY ARE OFFERED.

O THE PRIMARY REASON FOR LIFT EQUIPPING A VEHICLE IS TO PROVIDE ACCESSIBILITY FOR PERSONS IN WHEELCHAIRS OR PERSONS SUFFERING FROM A SEVERE, PERMANENT PHYSICAL IMPAIRMENT. PERSONS CONFINED TO WHEELCHAIRS OR SUFFERING

FROM A SEVERE PHYSICAL IMPAIRMENT MAKE UP APPROXIMATELY FIVE TO SEVEN PERCENT OF THE TOTAL DISABLED POPULATION. FURTHERMORE, MANY DISABLED PERSONS WITH SEVERE PHYSICAL IMPAIRMENTS REQUIRE A COMPANION AND CANNOT GET TO A REGULAR ROUTE BUS STOP WITHOUT ASSISTANCE. LIFT EQUIPPED REGULAR ROUTE VEHICLES AND THE ATTENDANT OPERATING AND ADMINISTRATIVE COSTS ARE NOT USED BY THE BLIND, THE DEAF, THE MENTALLY IMPAIRED OR THE ELDERLY. THIS IS THE MAIN REASON THAT SO MANY COMMUNITIES IN VIRGINIA AND AROUND THE COUNTRY HAVE DETERMINED, WITH THE INPUT AND SUPPORT OF THEIR DISABLED RESIDENTS, THAT A PARATRANSIT SYSTEM PROVIDES THE BEST SERVICES FOR THE GREATEST NUMBER OF PEOPLE.

OTHER SYSTEMS, PRIMARILY THOSE IN LARGE URBAN AREAS, HAVE DETERMINED THAT LIFT EQUIPPING THE REGULAR ROUTE BUS SYSTEM IS THE BEST WAY TO SUPPLEMENT THE EXISTING PARATRANSIT SERVICES OPERATED BY SOCIAL SERVICE AGENCIES. AS I NOTED EARLIER, REQUIRING TRANSIT AGENCIES TO OPERATE BOTH FIXED ROUTE AND PARATRANSIT SERVICES, BASED ON PRIOR EXPERIENCE, WILL INEVITABLY LEAD TO "DUMPING" OR RESULT IN A LESSER LEVEL OF PARATRANSIT SERVICE THAN EXISTS TODAY, OR BOTH.

TOWARDS A CONSTRUCTIVE APPROACH

AS IS THEIR PRIMARY MISSION, TRANSIT AGENCIES TEND TO ADDRESS THIS ISSUE IN TERMS OF EFFICIENT SERVICE DELIVERY. TRANSIT AGENCIES FREQUENTLY FEEL THAT THE GREAT STRIDES THAT HAVE BEEN MADE IN PROVIDING IMPROVED TRANSPORTATION FOR THE DISABLED ARE NOT FULLY RECOGNIZED. FOR EXAMPLE, IN 1988 THE GRTC WAS FORCED TO TAKE OVER THE EXISTING PARATRANSIT SYSTEM ON THREE DAYS NOTICE WHEN IT SUDDENLY WENT BANKRUPT. THE INVESTIGATION REVEALED THAT THE VANS HAD BEEN POORLY MAINTAINED AND THE SERVICE IMPROPERLY MANAGED BY THE NON-PROFIT MANAGEMENT AGENCY, BUT THE TRANSIT AGENCY RECEIVED ALMOST NO CREDIT FOR STEPPING IN AND RESUMING SERVICE ALMOST IMMEDIATELY.

I WOULD LIKE TO DESCRIBE HOW VIRGINIA HAS DEALT WITH THIS SITUATION OVER THE LAST TWO YEARS IN THE HOPE THAT IT MAY HELP THE CONGRESS DEAL WITH THIS ISSUE. IN THE 1988 SESSION OF THE GENERAL ASSEMBLY, A BILL TO MANDATE LIFTS ON ALL NEW REGULAR ROUTE BUSES WAS INTRODUCED. IT BECAME CLEAR THAT STATUTORILY MANDATING THE METHOD WAS COUNTERPRODUCTIVE. IT WAS EQUALLY EVIDENT THAT A METHOD TO PROVIDE INCENTIVES IN ORDER TO ACHIEVE CERTAIN SERVICE GOALS WAS A BETTER WAY TO GO. A COMPROMISE WAS

STRUCK: THE VIRGINIA DEPARTMENT OF TRANSPORTATION WAS AUTHORIZED TO REIMBURSE 95 PERCENT OF THE LOCAL CAPITAL EXPENDITURES FOR DISABLED TRANSPORTATION PROGRAMS (A MATCH 25 PERCENT HIGHER THAN AVAILABLE FOR OTHER TRANSIT CAPITAL GRANTS). VIRGINIA WAS PRAISED BY THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES FOR "PROVIDING THE LEAD FOR OTHER STATES BY ACTING TO REDUCE A MAJOR IMPEDIMENT TO EMPLOYMENT FOR MANY PEOPLE WITH DISABILITIES." I MENTIONED EARLIER THAT IN THE FIRST YEAR ALMOST $1.8 MILLION IN NEW CAPITAL PROJECTS FOR DISABLED TRANSPORTATION RESULTED FROM THIS INNOVATIVE PROGRAM.

ONE FINAL, SHINING EXAMPLE OF HOW A COOPERATIVE APPROACH TO THIS ISSUE HAS EVOLVED IN VIRGINIA IS A MEETING BETWEEN DISABLED REPRESENTATIVES AND VAPTO OFFICERS HELD IN LATE JANUARY, 1989 AT WHICH A DRAFT RESOLUTION (ATTACHED) WAS DEVELOPED. THE CONCEPT UNDERLYING THE RESOLUTION IS TO ESTABLISH A PROCESS FOR TRANSIT PROVIDERS AND DISABLED ADVOCATES TO MEET ON A REGULAR BASIS AND, ABSENT THE EMOTIONAL CONTENT OF MANDATES AND LEGISLATION, DETERMINE IF SERVICE DELIVERY UNDER THE EXISTING LOCAL OPTION REQUIREMENTS CAN BE IMPROVED. THE RESOLUTION WILL BE APPROVED BY VAPTO AT OUR SPRING MEETING IN A FEW WEEKS AND REFERRED TO THE DISABLED GROUPS FOR THEIR CONCURRENCE.

MY REASON FOR TESTIFYING TODAY AND RELATING WHAT HAS OCCURRED IN VIRGINIA IS TO SUGGEST THAT SERIOUS THOUGHT BE GIVEN TO A SIMILAR SYSTEM OF INCENTIVES AT THE NATIONAL LEVEL. I HAVE ABSOLUTELY NO DOUBT THAT S. 933 COULD LEAD TO MANY OF THE UNINTENDED CONSEQUENCES I REFERRED TO EARLIER; INSTEAD, CONSIDER BUILDING UPON THE IMPROVEMENTS THAT HAVE ALREADY OCCURRED UNDER EXISTING STATUTES THROUGH A SYSTEM OF FINANCIAL AND MANAGEMENT INCENTIVES DESIGNED TO CREATE IMPROVED TRANSPORTATION FOR DISABLED PERSONS, TARGETED TO THE LOCAL LEVEL SO THAT LOCAL CONDITIONS AND DESIRES CAN BE RECOGNIZED.

AT VAPTO, WE BELIEVE THE APPLICATION OF COMMON SENSE, LEAVENED WITH SOME CREATIVITY, IS THE BEST SOLUTION FOR THIS ISSUE. THE CHALLENGE FOR THIS COMMITTEE AND THE CONGRESS IS TO DRAFT A STATUTE THAT PROMOTES "CREATIVE COMMON SENSE" AS ITS PRIMARY INGREDIENT. A STATUTE THAT EMPHASIZES THE CARROT RATHER THAN THE STICK WILL ULTIMATELY RESULT IN FAR GREATER AND LASTING IMPROVEMENTS IN TRANSPORTATION FOR THE DISABLED WHERE IT REALLY COUNTS: ON THE STREET, AT THE LOCAL LEVEL. THANK YOU.

VAPTO Disabled Transportation Survey

October, 1987

Properties	Year Began	Lift	Special	Passenger Trips FY '86	FY '87	FY '88	FY '88 Cost	Plans for Expansion	FY 88' % of Operating Cost
Alexandria	1984		X	10,557	14,362	19,000	$ 135,000	Yes (Special)	8.8%
Blacksburg	1983		X	4,389	5,333	6,506	110,000	No	10.0%
Charlottesville	1987	X(2)					10,000	Yes (Lift)	1.0%
Danville	1987		X		20	100	400	No	.07%
Fairfax City	1986		X		121	175	2,520	No	.36%
Fairfax County	1985	X(2)	X	86	7	344,207	3,985,549	Yes (Lift)	
Harrisonburg	1979		X					No	
James City County	1981		X		5,217	5,500	40,000	No	15.0%
JAUNT	1975	X(6)	X	30,401	40,480	45,000	797,122	Yes (Lift)	100.0%
Lynchburg	1985		X	2,700	2,700	5,000	20,000	Yes (Special)	1.0%
Peninsula TDC	1979		X	25,881	28,443	30,000	321,693	No	4.2%
Petersburg	1979		X	11,904	13,475	14,000	46,130	No	6.0%
Prince William County								Yes	
Richmond	1978	X(47)	X	101,692	84,881	90,621	787,000	No	4.6%
Roanoke	1979		X	3,000	3,250	4,200	65,000	Yes (Special)	3.0%
Tidewater TDC	1978		X	204,026	210,000	220,000	1,557,977	Yes (Special)	7.8%
Winchester	1981	X(8)						No	
Washington Metro	1976/79	X(90)		18,000	25,000	31,500	3,200,000	Yes (Lift)	.7%
TOTAL		6(153)	14	412,636	408,314	815,409	11,078,391		

Only two (2) properties (Washington Metro, Winchester) provide lifts exclusively. Charlottesville, Fairfax County and Richmond have lifts; other service is by arrangement with specialized providers (JAUNT, FASTRAN & SPECTRAN). Trips (not including FASTRAN in Fairfax County) increased over 15% from FY '87 to FY '88 (projected). Eight (8) properties exceed Federal 3% cost guidelines. FY '88 average cost per disabled trip: $13.58

COMMONWEALTH OF VIRGINIA FINANCIAL ASSISTANCE TO PUBLIC TRANSPORTATION

Financial Incentive Program for Capital Improvements to Serve the Disabled

Fiscal Year 1989

A Report on the First Year of the Incentive Program

Rail and Public Transportation Division
Virginia Department of Transportation

December 1988

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Summary

In January of 1988, Governor Baliles asked the Commissioner of Transportation and the Commonwealth Transportation Board to consider developing a program that would enhance the transportation capabilities of Virginians with disabilities. In response to the Governor's request, the Virginia Department of Transportation (VDOT) developed a new program of state financial assistance for public transportation. This new program was designed to assist Virginia's public transportation operators in undertaking additional capital improvements which serve people with disabilities and which will build on the substantial base of existing services.

In March of 1988, the Commonwealth Transportation Board approved the new "Financial Incentive Program for Capital Improvements to Serve the Disabled." This program was developed in consultation with the Virginia Department for Rights of the Disabled and the Virginia Association of Public Transit Officials. The key points of the incentive program are as follows:

* The program establishes improved public transportation services for the disabled as a high priority for the Commonwealth.

* The program does not suggest a State preference for any method of service delivery. Equal consideration is given to accessibility improvements to regular route transit services and to improvements for specialized transportation services for the disabled.

* The program allows maximum flexibility to local governments in designing services that meet the particular needs of their disabled constituents. It encourages continued dialogue between local governments and their disabled communities in determining how to best meet their mobility needs.

In addition to the financial incentive program, there are two other initiatives which have been undertaken by VDOT that are intended to enhance the new program. "Innovations in public transportation services for the disabled" has been designated as an emphasis area for state transit demonstration grants in Fiscal Year 1990. Localities that operate transit service have been encouraged to develop proposals for innovations in transportation services for the disabled. These proposals will be submitted for funding in Fiscal Year 1990 and may include operating expenses for up to a one year demonstration period. Accepted proposals will receive state support at 95 percent of the cost borne by the locality.

Certain special proposals for disabled transportation improvements have been forwarded to the Governor's Office for funding consideration through oil over-charge or stripper well funds. Decisions on these proposals are pending.

The financial incentive program was the focal point of VDOT's initiatives to improve transportation service for the disabled during the past year and benefits from this program already are being realized. In May, the Commonwealth Transportation Board approved a public transportation program of projects for Fiscal Year 1989 that included over $590,000 in state grants to thirteen public transportation systems under the new incentive program. Combined with federal and local aid, these funds will be used to finance capital improvements for the disabled totaling approximately $1,800,000 this year.

The incentive program has attracted support from all parts of the Commonwealth. In addition, the program was recently recognized in a letter to

Governor Baliles from the President's Committee on Employment of People With Disabilities. The program was recognized for the significant benefits it provides to people with disabilities. Even though the financial incentive program is still in its first year, it has served to promote further consultation and cooperation between public transportation providers and the disabled communities that they serve. This is essential to the goal of the program: improved public transportation services for Virginians with disabilities.

Program Description

All localities that operate public transportation services are encouraged to undertake additional capital improvements which are designed specifically to improve the use of their services by the disabled Proposed improvements which are found to be reasonable and appropriate by VDOT and the Commonwealth Transportation Board will receive state funding at the maximum state participation ratio (95 percent of the non-federal share). All other state public transportation capital grants receives funding at a lower participation ratio which varies from year to year. The current (FY89) state participation ratio for public transportation capital grants is 75 percent.

Proposed improvements must be related directly to passenger services for the disabled and only those services operated with rubber-tired vehicles are eligible. Accessibility to rail transit service is already required by federal regulations and building codes governing architectural barriers. Examples of eligible improvements include: the purchase and installation of wheelchair lifts lifts on buses, trolleys, and vans; the purchase of vans used for the transportation of the disabled by the public transportation operator or through a service contract between the transit operator and a third party; and the purchase and installation of telecommunications equipment for the deaf, braille signing or transit schedule printing, or on-board audio equipment for announcing destinations and stop locations.

The incentive grants are awarded as part of the state public transportation capital assistance program and drawn from the same fund. Therefore, the Commonwealth Transportation Board has retained the right to limit the amount of funds that a recipient can receive in a single year. No limit was imposed in Fiscal Year 1989.

Capital Incentive Grants for Fiscal Year 1989

During the first year (FY89) of the Capital Incentive Program, thirteen Virginia transit systems received funding. Table 1 provides a list and description of the projects funded in the first year of the program. The estimated total cost of the projects is $1,782,500. The table presents the total amount of each incentive grant including a breakdown of federal transit aid, state aid and local match.

The amount of state funds awarded under the incentive program totaled $590,378. The following equipment will be purchased through these grants: thirty-two wheelchair lifts for transit coaches, three wheelchair lifts for trolleys, four body-on-chassis vehicles with wheelchair lifts, and thirty-eight vans with wheelchair lifts.

Arlington County received state aid funds of $42,750 under the incentive program to help purchase wheelchair lifts for three new trolley buses. Arlington County began operating the Crystal City Trolley service in 1987 with two trolleys and a lift-equipped van. The county will purchase three trolleys with wheelchair lifts to continue this service. The service is operated by a private for profit operator.

The Tidewater Transportation District Commission (TTDC) through the Tidewater Regional Transit (TRT) operates a special transportation service for its transportation for the disabled. TRT operates forty-one vehicles under this service. TTDC received funding under the incentive program to help purchase seventeen vans (fifteen with lifts) and three small buses for specialized services. These vehicles will replace old, worn out equipment. TTDC received $85,500 in state aid for the fifteen vans with wheelchair lifts

Table 1

Commonwealth of Virginia Financial Assistance to Public Transportation

Financial Incentive Grants for Captial Improvements to Serve the Disabled - Fiscal Year 1989

Grant Recipient	Project Description	Total Project Cost	Federal Funds Provided	Incentive Grants	Local Funds Provided
Arlington County	Purchase wheelchair lifts for 3 new trolley buses.	$45,000	$0	$42,750	$2,250
Tidewater Transportation District Commission	Purchase 17 vans (15 with lifts) and 3 small buses for specialized services.	$600,000	$360,000	$228,000	$12,000
Greater Richmond Transit Company	Purchase wheelchair lifts for 29 new buses.	$435,000	$413,250	$20,663	$1,087
Peninsula Transportation District Commission	Purchase 7 vans with lifts and TDD system for specialized services.	$224,700	$83,160	$134,463	$7,077
Greater Lynchburg Transit Company	Purchase 1 body-on-chassis (BOC) vehicle with lift for specialized services.	$40,000	$32,000	$7,600	$400
Petersburg Area Transit	Purchase 2 vans with lifts for specialized services.	$48,000	$0	$45,600	$2,400
Charlottesville Transit System	Purchase 1 van with lift for specialized services.	$25,000	$0	$23,750	$1,250
Central Virginia Transportation (Cumberland, Va.)	Purchase 1 van with lift for specialized services.	$24,000	$19,200	$4,560	$240
District III Governmental Cooperative (Marion, Va.)	Purchase 4 vans and 1 BOC with lift for specialized services.	$108,800	$87,040	$20,672	$1,088
Harrisonburg Transit	Purchase 1 body-on-chassis (BOC) vehicle with lift for specialized services.	$40,000	$32,000	$7,600	$400
JAUNT Inc. (Charlottesville Area)	Purchase 4 vans with lifts and 1 BOC with lift for specialized services.	$141,000	$112,800	$26,790	$1,410
Winchester Transit	Purchase 1 van with lift for specialized services.	$27,000	$21,600	$5,130	$270
Tazewell County Transit	Purchase 1 van with lift for specialized services.	$24,000	$0	$22,800	$1,200
	Total:	$1,782,500	$1,161,050	$590,378	$31,072

and $142,500 in state aid for the three small buses and two vans. These grants together total $228,000.

The Greater Richmond Transit Company (GRTC) received state financial incentive funds of $20,663 to help purchase wheelchair lifts for twenty-nine new buses. These buses will be used in GRTC's fixed route service.

The Peninsula Transportation District Commission received $134,463 from the incentive program to help purchase seven vans with lifts for its special service and a Telecommunication Device for the Deaf (TDD). The seven vans with lifts will replace other worn out vans. The TDD system will be used to provide route and scheduling information for the hearing impaired.

The Greater Lynchburg Transit Company (GLTC) received $7,600 from the incentive program to help purchase on body-on-chassis vehicle with a lift for special services. Due to expected increases in demand, an additional lift-equipped vehicle is needed for this service.

The City of Petersburg received $45,600 to help purchase two vans with lifts for its specialized service. Petersburg plans to lease these vehicles to provide its special service.

The City of Charlottesville will purchase one van with a lift for special services. They received $23,750 in state incentive funds. This vehicle will be leased to another operator to provide Charlottesville's special service.

The Central Piedmont Action Council (CPAC) in Cumberland, Virginia, received funds to help purchase a van for special service. The van replaces another van whose useful life has expired. CPAC received $4,560 in state aid.

District III Governmental Cooperative in Marion, Virginia, received $20,672 in state aid from the incentive program to help purchase four vans and one body-on-chassis vehicle with a lift for special services. The vehicles will be used to replace worn out equipment and to serve the increased demand for service.

The City of Harrisonburg received state aid of $7,600 to help purchase a body-on-chassis vehicle with a lift for its special service. The vehicle will be used for a new route to support the growth of James Madison University.

Jefferson Area United Transportation, Inc. (JAUNT) received $26,790 in state aid funding from the incentive program to purchase four vans with lifts and a body-on-chassis vehicle with a lift for special service. The four vans will replace worn out equipment. The body-on-chassis vehicle will allow JAUNT, Inc. to expand their rural service.

The City of Winchester was granted $5,130 in state aid to help purchase a van with a lift for its special services. This vehicle will allow Winchester to provide on-call transportation services for the disabled.

Tazewell County received $22,800 in state aid from the incentive program. This will allow this rural county to begin a special demand responsive service for the disabled.

Program Outlook for Fiscal Year 1990

In a survey of Virginia's transit operators conducted in September of 1988, VDOT requested a preliminary preview of the requests for Fiscal Year 1990 grants under the program. Eighteen of Virginia's thirty-one public transportation systems indicated that they anticipated submitting a grant application under the incentive program for the coming fiscal year. The anticipated total cost of the proposed improvements is expected to be $1,640,000, and a total of $543,400 in state capital assistance will be required to fund these incentive grants.

These funds will be used to help purchase thirty-eight wheelchair lifts for transit coaches, thirty-one vans with wheelchair lifts, and three body-on-chassis vehicles with wheelchair lifts.

These proposed grant applications have not been reviewed and approved by the policy boards which oversee the transit properties and should be considered very preliminary estimates. For this reason the grant applications anticipated from each transit property are not identified in this report.

Program Assessment

Virginia's public transportation operators had very little time to respond when the incentive program was announced in March of 1988. This announcement came after the close of the application cycle for the other, ongoing public transportation grant programs. A special, condensed grant application process was conducted for the incentive program in order to ensure that grants would be awarded for the upcoming fiscal year. Applications were due into VDOT by the first of April for proposals to be funded in FY89. Yet the response to the program was very good. This was due largely to the fact that Virginia's public transportation operators already had well established transportation programs for their disabled constituents, and they were cognizant of their needs for capital improvements. It appears that the incentive program enabled Virginia's transit operators to move to a higher priority those capital improvements which are designed to serve the disabled. Therefore, the incentive program is working to establish improved public transportation services for the disabled as a high priority in the Commonwealth. It is important to note that the transit industry in Virginia has been supportive of this initiative. This is true even though the incentive program is funded with state public transportation capital assistance monies which are in great demand. Clearly, Virginia's public transportation operators share the concern of the Governor and the Commonwealth Transportation Board regarding the mobility of our disabled citizens.

The incentive program also has attracted the attention of numerous disabled citizens associations and human service agencies in the Commonwealth. Many of these associations and agencies have been very supportive of this program. The incentive program recently received national recognition when the President's Committee on Employment of People with Disabilities sent a commendatory letter to the Governor of Virginia.

Most significantly, the incentive program has helped to emphasize the importance of communications between public transportation operators and the disabled citizens that they serve. The capital improvements proposed under the incentive program are designed to meet the needs of the local disabled communities as expressed by these citizens themselves. It is the firm belief of the Commonwealth Transportation Board and the Virginia Department of Transportation that consultation and cooperation between the public transportation provider and the local disabled community are essential to the goal of the incentive program: improved, effective public transportation services for Virginians with disabilities.

APPENDIX 1

PROGRAM CHRONOLOGY & RELATED DOCUMENTS

The following is a chronology of the State Aid to Public Transportation application process for Fiscal Year 1989--the first year of the Financial Incentive Program for Capital Improvements to Serve the Disabled.

DECEMBER 1, 1987	VDOT announces the opening of the grant application process for FY89 state aid to public transportation. Applications are due by February 16, 1988 for all grant categories.
JANUARY 20, 1988	Governor Baliles sends a letter to VDOT Commissioner Pethtel requesting the Commonwealth Transportation Board (CTB) to consider a financial incentive mechanism for encouraging public transportation capital improvements which enhance the mobility of Virginians with disabilities. (Attachment 1)
JANUARY 29, 1988	Commissioner Pethtel transmits the Governor's letter to the Board and places this item on the agenda for the Board's February meeting. VDOT staff begins examining options and discussing options with the Virginia Association of Public Transit Officials (VAPTO) and the Virginia Department for Rights of the Disabled (VDRD).

FEBRUARY 2, 1988	Board of Directors of VAPTO meets and adopts a position statement regarding improved transportation for the disabled; also appoints a subcommittee to work with VDOT on the incentive program.
FEBRUARY 8, 1988	VDOT staff meets with VAPTO subcommittee to examine options for incentive program. Recommendations of VDRD are reviewed.
FEBRUARY 15, 1988	All applications received for FY89 state transit grants. Application review process initiated; target completion date is March 23, 1988.
FEBRUARY 18, 1988	VAPTO and VDRD representatives present their opinions and recommendations to the Multi-Modal Committee of the CTB, and the full Board approves a resolution which instructs VDOT to develop a financial incentive program to be initiated with grants awarded for FY89.
FEBRUARY 24, 1988	VDOT staff submits a proposal for a financial incentive program for improving the mobility of Virginians with disabilities. Proposal is forwarded to CTB for consideration at their March meeting. VAPTO and VDRD are advised of staff recommendations. All eligible recipients of state transit grants are advised of staff recommendations and of the tentative application deadline of April 1, 1988.

EARLY MARCH, 1988	An amendment to the Appropriations Act of 1988 is introduced which authorizes the CTB to award financial incentive grants for public transportation to the disabled within the state aid for public transportation capital assistance subprogram. This amendment~~s~~ is offered in lieu of an earlier amendment which would have removed the requirement that the Highway Maintenance and Operating Fund program must be distributed under the same formula as the Mass Transit Trust Fund component.
MARCH 17, 1988	Commonwealth Transportation Board approves a resolution creating the financial incentive program. (Attachment 2) A press release is issued and a letter is sent out to all public transportation operators eligible to receive grants under the incentive program.
APRIL 1, 1988	Applications received for capital incentive grants for transportation improvements for the disabled.
APRIL 21, 1988	Entire proposed FY89 Program of Projects for state aid to public transportation is reviewed and discussed by the Multi-Modal Committee at their regular April meeting.

MAY 19, 1988	Entire proposed FY89 Program of Projects for state aid to public transportation is presented at the Commonwealth transportation Board for their approval.
JULY 1, 1988	Execution of contracts for all FY89 grants is initiated.
NOVEMBER 19, 1988	Commonwealth Transportation Board passes a resolution (Attachment 3) commending Virginia's transit operators, the Department for the Rights of the Disabled, and the local disabled groups for their cooperative efforts in working to make the incentive program successful. The resolution also affirms the Board's belief that localities, in consultation with their local disabled communities, should continue to determine the most appropriate method for providing public transportation services to the disabled.

Attachment #1

COMMONWEALTH *of* VIRGINIA

Office of the Governor

Richmond 23219

Gerald L. Baliles
Governor

COMMISSIONER'S
JAN 22 1988
OFFICE

January 20, 1988

Mr. Ray D. Pethtel, Chairman
Commonwealth Transportation Board
1221 East Broad Street
Richmond, Virginia 23219

Dear Ray:

Congratulations on your recent appointment as Chairman of the ASHTO Standing Committee on Public Transportation. I am sure you will do well. You have provided leadership not only in speeding up projects and putting money to work but doing so with a keen eye on the total picture. Your child care proposal is one such example.

Virginia has an opportunity now to take the lead in encouraging localities to make their public transit facilities accessible to all her citizens. In that regard, I would like for you to explore options for providing financial incentives for public transportation operators to purchase transit vehicles which are wheelchair accessible. One option suggested to me would be to provide state financial support for capital projects involving the purchase of buses, trolleys and vans which are equipped with wheelchair lifts at a higher level of state participation.

As we have discussed from the very beginning, our transportation initiatives will and should benefit all Virginians. I would like you to work with your Board over the next several weeks to suggest a mechanism that will also enhance the transportation capabilities of Virginians with disabilities. This is an issue of great importance to me.

Mr. Ray D. Pethtel, Chairman
January 20, 1988
Page 2

With kindest regards, I am

Sincerely,

Gerald L. Baliles

Attachment #2

PUBLIC TRANSPORTATION FOR THE DISABLED

CAPITAL FINANCIAL INCENTIVE PROGRAM

Moved by H. V. Kelly, Sr., Seconded by Dr. Daphyne S. Thomas

WHEREAS, in a resolution passed on February 18, 1988, this Board affirmed its commitment to ensuring that transportation facilities and services improve the mobility of all of Virginia's citizens; and

WHEREAS, this Board requested the Department of Transportation to develop a proposal for a capital financial incentive program for public transportation projects which serve persons with disabilities; and

WHEREAS, members of this Board and the Department have met with representatives of the Department for Rights of the Disabled and the Virginia Association of Public Transit Officials and careful consideration has been given to the opinions expressed by all concerned parties; and

WHEREAS, it is the opinion of this Board that public transportation services for the disabled must be designed in a cooperative effort between local governments and their disabled citizens, and therefore, the capital financial incentive program should not suggest a specific state preference in the approach taken to the delivery of public transportation services to the disabled; and

WHEREAS, it is the desire of this Board to ensure that the capital financial incentive program is undertaken as soon as possible and is effective in encouraging improvements to public transportation services to the disabled without disrupting plans for improvements to transportation services for the full general public; and

NOW, THEREFORE, BE IT RESOLVED, that this Board will accept applications from eligible recipients of state transit assistance for grants to support capital improvement projects which are designed specifically to increase the mobility of disabled persons; and

FURTHER, BE IT RESOLVED, that such projects will be eligible to receive state support for 95 percent of the expenses borne by the locality for the incremental cost of a component to a capital improvement and/or the full cost of a stand-alone capital improvement designed to assist disabled persons who require special equipment or services; and

FURTHER BE IT RESOLVED, that this financial incentive program will be extended to capital projects for rubber-tired transit services exclusively and may have an annual limit per recipient to be determined by this Board; and

FURTHER BE IT RESOLVED, that this Board requests the Department of Transportation to implement this financial incentive program as part of the FY 88-89 Program of Projects and to report on the progress of this program by December 1988.

* * * *

Motion carried 3/17/88

Attachment #3

RESOLUTION
OF THE
COMMONWEALTH TRANSPORTATION BOARD
CONCERNING
PUBLIC TRANSPORTATION FOR DISABLED PERSONS

WHEREAS, the Commonwealth Transportation Board on March 17, 1988, instituted a capital financial incentive program for public transportation projects which serve persons with disabilities; and

WHEREAS, this program was adopted at the request of the Governor and after consultation with representatives of the Department for Rights of the Disabled and the Virginia Association of Public Transit Officials; and

WHEREAS, the Board believes that successful programs for the public transportation needs of all Virginians, including special programs for the disabled, are enhanced through cooperative efforts at the local level, especially concerning the method for the delivery of such services; and

WHEREAS, in an effort to begin this program as soon as possible, requests for public transportation capital grants were reopened so that public transportation operators could amend their FY 1989 grant requests to provide additional equipment and facilities to serve the disabled; and

WHEREAS, such projects are eligible to receive state support for 95 percent of the expenses borne by the locality for the incremental cost of a component to a capital improvement and/or the full cost of a stand-alone capital improvement designed to assist disabled persons; and

WHEREAS, 13 public transportation operators received grants under this program in the amount of $590,378, which provided additional funding for the purchase of 32 wheelchair lifts for transit buses and 42 paratransit vehicles for specialized services for the disabled; and

WHEREAS, the rapid response of Virginia's public transportation operators to this program is further evidence of their commitment to increase the existing high levels of transportation services for the disabled; and

WHEREAS, the President's Committee on Employment of People with Disabilities has commended Governor Baliles for providing the lead for other states by acting to reduce a major impediment to employment for many people with disabilities, thus helping thousands of Virginians to live more productive and satisfying lives;

NOW, THEREFORE, BE IT RESOLVED that the Commonwealth Transportation Board commends the Virginia Association of Public Transit Officials, the Department for Rights of the Disabled and the many local disabled groups for their cooperative approach to enhancing transportation for the disabled community; and

BE IT FURTHER RESOLVED that the Board believes the current program, which allows each locality or public transportation operator to work with their local disabled community to determine the most appropriate method for providing such transportation, is a model for the nation; and

BE IT FURTHER RESOLVED that the Board encourages public transportation providers and the state and local disabled communities to continue working together to further improve local option transportation services for the disabled under the existing Capital Incentive Program.

Moved by Mr. Beyer

Seconded by Mr. Musselwhite

Motion carried November 19, 1988

REC'D. DEC 7 1988

Adult Development Center Inc.
3111 West Clay Street
Richmond, Virginia 23230
Phone 355-7816

✓ XCA
LWR

December 2, 1988

[redacted]
Richmond, VA 23230

Dear [redacted]

The purpose of this letter is to follow up on our telephone conversation of November 21, pursuant to my request for a meeting to open discussion on the transportation agreement between our agencies.

Complying with your request, I am enclosing a typical schedule of the Adult Development Center's current transportation. Typical is a key word because, as I am sure you understand, this schedule is subject to change based upon individual circumstances relating to mental and physical health. Nevertheless, it represents the best information we can provide at this time and it should enable you to get an initial feel for the problem area.

Please keep in mind that all ADC clients are eligible for transportation subsidies within the Federal Program for Specialized Transportation for which the Greater Richmond Transit Authority has local responsibility. It is within the "consolidation" guidelines of that program that ADC is attempting to reduce its own program by seeking your comments and assistance. Your proposal will be considered together with those other agencies with whom we have consulted.

I will await further word from you.

Sincerely,

Fred Fluckiger

Fred Fluckiger
Chairperson, Board of Directors

FF/jso

Enclosure

ADULT DEVELOPMENT CENTER
MEMBERSHIP/TRANSPORTATION LOG

MONDAY
NORTHSIDE/DOWNTOWN

[redacted] 3
C [redacted]
WC [redacted] 4
C [redacted] 3
C [redacted]
C [redacted]
C [redacted]
WC [redacted] 4
WC [redacted] 6

INDEPENDENT

WC [redacted] 7
EWC [redacted] 5
EWC [redacted] 5
WC [redacted] 5
WC [redacted] 4
WC [redacted] 5

STAR

[redacted]
WC [redacted] 5
WC [redacted] 4
WC [redacted] 6
C [redacted]
[redacted]

RED CROSS

WC [redacted] 5

LOA's

[redacted]
WC [redacted] 4
W [redacted]

TUESDAY
SOUTHSIDE

WC [redacted] 2
[redacted]
WC [redacted] 4

CHURCH HILL

C [redacted] 3
[redacted]
[redacted]
C [redacted] 3
WC [redacted] 6
WC [redacted] 5
BC [redacted]
BC [redacted]

INDEPENDENT

C [redacted]
WC [redacted] 4
WC [redacted] 6
[redacted]
BC [redacted]

STAR

EWC [redacted] 5
WC [redacted] 5
WC [redacted] 5
[redacted]
WC [redacted] 5
WC [redacted] 4
[redacted]
[redacted]

RED CROSS

C [redacted]
WC [redacted]
C [redacted] 3

LOA's

WC [redacted] 5
[redacted]
C [redacted]
WC [redacted] 6

WEDNESDAY
NORTHSIDE/DOWNTOWN

[redacted]
WC [redacted] 3
C [redacted]
C [redacted]
WC [redacted] 4
C [redacted]
[redacted]
C [redacted]
C [redacted]
WC [redacted] 4
WC [redacted] 6

INDEPENDENT

W [redacted] 1
WC [redacted] 1
WC [redacted] 6
WC [redacted] 5
WC [redacted] 5

STAR

C [redacted]
[redacted]
WC [redacted] 5
[redacted]
WC [redacted] 4
C [redacted]
C [redacted] 6

RED CROSS

WC [redacted] 1

LOA's

W [redacted]

THURSDAY
CHURCH HILL

W [redacted] 3
[redacted]
[redacted]
[redacted]
C [redacted] 3
WC [redacted] 6
BC [redacted]
WC [redacted] 5
WC [redacted] 4
C [redacted]

INDEPENDENT

WC [redacted]
WC [redacted] 4
WC [redacted] 6
WC [redacted] 6
WC [redacted] 5
EWC [redacted] 5

STAR

EWC [redacted] 5
C [redacted]
WC [redacted] 4
WC [redacted] 6
[redacted]
WC [redacted] 5
C [redacted]

RED CROSS

WC [redacted] 5
C [redacted]
C [redacted] 3

LOA's

[redacted]

FRIDAY
SOUTHSIDE

WC [redacted] 2
EWC [redacted] 5
WC [redacted] 5
WC [redacted] 4

NORTHSIDE

[redacted] 3
C [redacted]
[redacted]
C [redacted] 6
WC [redacted] 6
[redacted]

INDEPENDENT

WC [redacted] 4
WC [redacted] 5
WC [redacted] 6
EWC [redacted] 5
WC [redacted] 6
WC [redacted] 5
WC [redacted] 4
WC [redacted] 5
[redacted]

STAR

C [redacted]
WC [redacted] 6
C [redacted]
WC [redacted] 4
C [redacted] 3
[redacted]

LOA's

WC [redacted] 6

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LEGEND OF CODES: C = Cane, BC = Blind Cane, W = Walker, CC = Crutches, * = Total Care
NUMBERIC CODES: 1 = WC @ ADC, 2 = Regular Transfers, 3 = WC on trip, 4 = Limited Transfers, 5 = Never Transfer,
6 = Readily Transfer, 7 = Volunteer Not Available

Revised 12/02/88

RESOLUTION SUPPORTING BETTER COMMUNICATIONS BETWEEN VAPTO AND ELDERLY & DISABLED CITIZENS

WHEREAS, the Virginia Association of Public Transit Officials (VAPTO) wishes to establish better communications with citizens who require specialized public transportation services; and

WHEREAS, VAPTO representatives met on January 23, 1989 with representatives of the Board for Rights of the Disabled (BRD) to discuss how communications could be improved between specialized transportation providers and specialized transportation recipients; and

WHEREAS, VAPTO and the BRD agreed that better communications could lead to improvements in transportation services for the elderly and disabled communities under current state and federal laws and regulations if all parties committed themselves to such an effort; and

WHEREAS, VAPTO agreed to draft a resolution outlining these goals for presentation to the BRD and other groups representing elderly and disabled persons for their consideration;

NOW, THEREFORE, BE IT RESOLVED that this resolution be presented to VAPTO, BRD and other groups representing the elderly and disabled community for their consideration and action; and

BE IT FURTHER RESOLVED that after approval the participating groups will convene an initial meeting in order to establish an orderly plan for better communications and more efficient and productive transportation services to benefit all parties to this resolution.

Prepared Statement of Harold C. Jenkins

Thank you, Mr. Chairman, and good afternoon. My name is Harold Jenkins and I'm the general manager of the Cambria County Transit Authority headquartered in Johnstown, Pennsylvania.

I've been asked to testify before this Committee this afternoon in support of the Americans With Disabilities Act of 1989. My support is based primarily upon our experiences in Cambria County with operating an urban transit system which is 100% accessible to those persons confined to wheelchairs. We've been operating a totally accessible transit system since 1983.

I want to emphasize from the outset that an accessible transportation system will only be as successful as the commitment behind the decision to provide accessible transit. I believe from our experience that unless management is firmly committed to the laudable goal of accessibility, persons with handicaps stand to be shortchanged somewhere along the line. Let me explain what I mean.

The very nature of physical disabilities contributes to the discrimination problems which exist with respect to individuals with handicaps. Many people are uncomfortable in dealing with those who are "different". This pattern has contributed immensely to the reluctance of many persons with handicaps to venture out into society in an attempt to join the mainstream. Consequently, if their fears are met by a transit system which is not seriously committed to providing reliable and safe accessible transit, their fears will only be compounded and the discrimination perpetuated.

In Cambria County, we made a commitment from the beginning to provide the best possible accessible system. We believed that only with this degree of commitment would we be able to overcome the built-in reluctance of many persons with disabilities, especially those in wheelchairs, to use accessible transit. Let me outline some of the steps we took which go beyond the simple provision of wheelchairs lifts.

From the beginning, we realized the importance of selling the concept of fixed-route accessible transit to potential users. I emphasized the word "selling" for the reasons previously mentioned. Many folks in our community with disabilities where reluctant to utilize an un-tested form of public transit. Therefore, we had to "sell" it. These efforts took many forms.

We initially conducted public demonstrations of the accessibility features of the bus. The local media provided extensive coverage, a vital consideration in any public awareness program. Concurrent with the bus demonstrations, we inaugurated a program to contact all the organizations in the community who worked with persons with handicaps. A very detailed slide show was prepared and presented to these groups, showing every step involved in the boarding and exiting of the bus. We prepared a special publication which highlighted the accessibility components of the bus and the sequence of steps involved in using the vehicles. Thousands of these brochures were distributed throughout the community. All these efforts helped to assure the passenger with a handicap that public transportation can be a safe and reliable means of transportation.

As a result of our educational efforts, we carried an average of 200 passengers in wheelchairs a month during the first eleven months of operation in 1980. That's 200 a month with only seven accessible buses. By 1983, our entire fleet of 27 buses was accessible, with the result that we now carry over 3000 passengers in wheelchairs each year. In addition, we annually transport about 36,000 passengers with other disabilities. And, we carry this number despite our inclement weather and hilly terrain. Why? Commitnent. A strong commitment to quality transit.

Another important component of our program has been driver training. In addition to receiving basic training in lift operation, all operators receive intensive sensitivity training. Drivers complete a comprehensive course consisting of films, wheelchair familiarity, boarding procedures, securement, and emergency evacuation. Drivers also spend a portion of their training period confined to a wheelchair in order to enhance their sensitivity to the various needs and

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feelings of passengers with disabilities. Annual refresher courses are also provided.

Another vital component of our program is wheelchair lift maintenance. There is no worse experience for a passenger in a wheelchair than to arrive at a bus stop expecting an accessible bus, only to find that the lift doesn't work. A quality maintenance program is critical. Drivers are also required, by union contract, to cycle their lift prior to beginning their work day. This procedure has benefits for the mechanical components of the lift. It also assures the operator that he or she has a functioning lift. If it doesn't operate properly, the operator is prohibited from leaving the garage with that bus.

All these steps I've just discussed go beyond the letter of the law. But without them, we believe an accessible system will be doomed to failure.

Finally, let me briefly touch upon several objections to accessibility which are frequently raised.

One objection concerns costs. The cost of the lift and its maintenance. We are in public transit to provide transit to the public. It's that simple. Persons with handicaps are members of the public. Therefore, we view the costs of equipping and maintaining buses with lifts as we do our other expenses. It's the cost of doing business. But, our experience demonstrates that once an honest commitment is made to provide quality accessible service, maintenance costs can be controlled. Our maintenance history over the past nine years has confirmed this point.

With respect to lift costs, the cost per lift will go down as lift utilization increases. And lift utilization will increase as the degree of commitment and quality of service increases. It's the old "as you sow, so shall you reap" aphorism.

Another objection centers on the slowing down of the system due to the extra time it takes to load and unload passengers in wheelchairs. We initially conducted time studies to document this fear. But, after six months, we discontinued the study because the time factor was seen as insignificant. We have carried about 15,000 passengers in wheelchairs since 1980 and have never received one complaint from ambulatory passengers about time delays due to wheelchair transport.

Another objection cites problems with unions. When a transit system makes an honest commitment from the outset to establish a credible accessible system, union problems will not exist. But, if the union senses that management's commitment is lackluster, the door may be opened for problems. As I said before, our union contract actually requires operators to cycle their lifts prior to their shift. This was an easy clause to get into the contract because the union understands the degree of management commitment. The special training received by operators also reinforces this commitment.

Finally, I want to state our contention that the establishment of a quality accessible fixed route system will often negate the need for a call and demand system to be simultaneously operated in the community. If the accessible system is developed and sold correctly, most individuals can avail themselves of the fixed-route system. The existing non-profit social services can usually fill in the gaps which exist. But, to be required to operate both types of systems would be an unwarranted financial hardship, especially in this era of steadily declining federal revenues.

Thank you very much for this opportunity to present Cambria County's experiences. If you have any questions, I'll be happy to answer them.

TESTIMONY OF DENNIS D. LOUWERSE
AMERICAN PUBLIC TRANSIT ASSOCIATION

GOOD AFTERNOON MR. CHAIRMAN, MY NAME IS DENNIS LOUWERSE. I AM THE EXECUTIVE DIRECTOR OF THE BERKS AREA READING TRANSPORTATION AUTHORITY IN READING, PENNSYLVANIA. I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE THE SUBCOMMITTEE THIS AFTERNOON ON BEHALF OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION (APTA). APTA IS A NON-PROFIT ORGANIZATION REPRESENTING LOCAL MASS TRANSIT SYSTEMS. APTA'S MEMBERS INCLUDE OVER 400 NORTH AMERICAN PUBLIC AND PRIVATE MASS TRANSIT SYSTEMS, WHICH CARRY OVER 95 PERCENT OF THE PERSONS USING PUBLIC TRANSIT IN THE UNITED STATES; AND OVER 430 MANUFACTURERS, CONSULTANTS, ACADEMIC INSTITUTIONS AND GOVERNMENT AGENCIES INVOLVED IN THE MASS TRANSIT INDUSTRY.

IN ADDITION TO SERVING AS THE EXECUTIVE DIRECTOR OF THE TRANSIT SYSTEM IN READING, PENNSYLVANIA, I SERVE ON APTA'S ELDERLY AND DISABLED PERSONS SERVICES TASK FORCE. THIS TASK FORCE, WHICH WAS CREATED TO ENSURE THAT THE TRANSIT INDUSTRY CONTINUES TO MEET ITS OBLIGATIONS TO THE ELDERLY AND PERSONS WITH DISABILITIES, HAS THE FOLLOWING OBJECTIVES:

- ON AN ON-GOING BASIS, TO SURVEY THE STATUS OF THE TRANSIT INDUSTRY'S SERVICE, POLICIES, AND PRACTICES REGARDING TRANSIT SERVICE TO THE ELDERLY AND PERSONS WITH DISABILITIES, AND TO MAKE RECOMMENDATIONS, AS APPROPRIATE.

- TO REVIEW THE IMPLEMENTATION OF THE U.S. DEPARTMENT OF TRANSPORTATION'S REGULATIONS GOVERNING MASS TRANSPORTATION SERVICES FOR DISABLED PERSONS.

- TO INTERFACE WITH RESPONSIBLE NATIONAL ORGANIZATIONS REPRESENTING ELDERLY AND DISABLED PERSONS IN ORDER TO EXCHANGE INFORMATION AND VIEWS ON THE PROVISION OF PUBLIC TRANSPORTATION AFFECTING THESE IMPORTANT CLIENTS OF THE PUBLIC TRANSIT INDUSTRY.

APTA AND THE TRANSIT INDUSTRY HAVE CONSISTENTLY RECOGNIZED THAT PROVIDING FOR THE MOBILITY NEEDS OF OUR NATION'S CITIZEN WHO ARE ELDERLY AND DISABLED IS A MAJOR OBJECTIVE AND CHALLENGE FOR PUBLIC TRANSIT SYSTEMS ACROSS THE COUNTRY. MEETING THE CHALLENGE OVER THE PAST FEW YEARS HAS BEEN MADE MUCH MORE DIFFICULT BECAUSE WE HAVE EXPERIENCED A DRASTIC REDUCTION IN THE FEDERAL TRANSIT PROGRAM OF MORE THAN 50% IN REAL DOLLARS. STILL DEEPER CUTS HAVE BEEN PROPOSED BY THE ADMINISTRATION IN THE FY 90 BUDGET WHICH, IF ADOPTED, WOULD FORCE MAJOR SERVICE CUTBACKS FOR ALL CITIZENS, INCLUDING THE ELDERLY AND PERSONS WITH DISABILITIES.

OUR CURRENT INDUSTRY POLICY, WHICH IS NOW UNDER REVIEW BY APTA'S TASK FORCE, IS THAT EACH COMMUNITY SHOULD CONTINUE TO BE PERMITTED TO DETERMINE THE BEST MEANS OF PROVIDING SERVICE TO THE ELDERLY AND THOSE WITH DISABILITIES BY TAILORING SERVICE TO THE DIVERSE NEEDS, CIRCUMSTANCES, AND DESIRES OF THE LOCAL COMMUNITY.

WE BELIEVE THAT DECISIONS ON THE APPROPRIATE MIX OF TRANSIT SERVICES FOR PERSONS WITH DISABILITIES SHOULD BE BASED ON A CONSIDERATION OF ALL FACTORS INCLUDING:

- THE VIEWS OF DISABLED PERSONS AND OTHERS IN THE COMMUNITY BEING SERVED.
- THE UNIQUE FEATURES OF EACH PUBLIC TRANSIT SYSTEM AND THE ENVIRONMENT IN WHICH IT OPERATES.
- THE FULL RANGE OF RESOURCES AVAILABLE IN EACH COMMUNITY.
- THE NEED TO PROVIDE AN APPROPRIATE BALANCE OF SERVICES TO ALL TRANSIT USERS (INCLUDING THE COMMUNITY AS A WHOLE, THE ELDERLY, PERSONS WITH DISABILITIES, AND OTHER TRANSIT DEPENDENT GROUPS) WITHIN THE CONSTRAINTS OF AVAILABLE RESOURCES.
- THE EXISTING TECHNOLOGY FOR MAKING PUBLIC TRANSIT ACCESSIBLE TO WHEELCHAIR USERS AND THE ABILITY OF TRANSIT SYSTEMS TO INCORPORATE THIS TECHNOLOGY INTO THEIR OPERATIONS AND MAINTAIN IT SAFELY AND RELIABLY.
- THE VIEWS OF STATE AND LOCAL ELECTED OFFICIALS.

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4.16

UNDER OUR POLICY, WE BELIEVE THE TRANSIT INDUSTRY HAS DEMONSTRATED A SOLID RECORD OF ACHIEVEMENT IN PROVIDING SERVICE TO THE ELDERLY

AND PERSONS WITH DISABILITIES. CERTAINLY IMPROVEMENTS CAN BE MADE. HOWEVER, IT SHOULD BE NOTED THAT, ON AN INDUSTRY-WIDE BASIS, WE COMMIT SOME $850 MILLION PER YEAR, OR 6% OF OUR NATIONAL OPERATING BUDGET TO THIS SERVICE. VIRTUALLY EVERY TRANSIT SYSTEM IN THE COUNTRY PROVIDES SERVICE FOR PERSONS WITH DISABILITIES IN ONE OF THREE WAYS:

- FIXED ROUTE, LIFT-EQUIPPED SERVICE UTILIZING VEHICLES WITH WHEELCHAIR LIFTS TO MAKE REGULARLY SCHEDULED BUS SERVICE ACCESSIBLE TO THOSE WHO USE WHEELCHAIRS. APPROXIMATELY 18% OF THE TRANSIT SYSTEMS IN THE U.S. PROVIDE THIS TYPE OF SERVICE, EXCLUSIVELY.

- DEMAND RESPONSIVE OR PARATRANSIT SERVICE OFFERING DOOR-TO DOOR SERVICE IN SMALLER VEHICLES THAT ARE SPECIALLY EQUIPPED WITH THE NEEDS OF THE DISABLED IN MIND. NEARLY 44% OF THE NATION'S TRANSIT SYSTEMS PROVIDE THIS TYPE OF SERVICE, EXCLUSIVELY.

- A COMBINATION OF LIFT-EQUIPPED, FIXED-ROUTE SERVICE AND DEMAND-RESPONSIVE SERVICE. NEARLY 38% OF TRANSIT SYSTEMS NATIONWIDE PROVIDING THIS MIX OF SERVICES.

IT IS IMPORTANT TO NOTE THAT THE PERCENTAGE OF LIFT-EQUIPPED BUSES, IN OUR NATIONAL FLEET OF APPROXIMATELY 57,000, HAS GROWN SIGNIFICANTLY DURING THE 1980'S.

YEAR	PERCENTAGE OF LIFT-EQUIPPED BUSES
1981	11 PERCENT
1987	30 PERCENT
1993 (PROJECTED)	53 PERCENT

THIS INCREASE IN THE NUMBER OF LIFT-EQUIPPED BUSES HAS COME DESPITE A DRAMATIC CUTBACK IN FUNDING OF THE FEDERAL TRANSIT PROGRAM.

IN ADDITION, WE ARE PROUD TO POINT OUT THAT NEW, FULLY-ACCESSIBLE RAIL SYSTEMS ARE OPERATING IN A NUMBER OF COMMUNITIES: SAN FRANCISCO; WASHINGTON, D.C.; ATLANTA; MIAMI; SAN DIEGO; PITTSBURGH; BUFFALO; SACRAMENTO; PORTLAND; AND SAN JOSE. A NUMBER OF OTHER NEW RAIL SYSTEMS ARE UNDER CONSTRUCTION, OR IN THE PLANNING STAGE AND THEY WILL ALL BE FULLY-ACCESSIBLE.

WITH RESPECT TO THE OLDER RAIL SYSTEMS, ACCESSIBILITY IMPROVEMENTS ARE BEING MADE AND INCORPORATED INTO THESE SYSTEMS AS THEY UNDERGO MODERNIZATION. ONE VERY POSITIVE EXAMPLE IS IN NEW YORK CITY WHERE THE METROPOLITAN TRANSPORTATION AUTHORITY AND REPRESENTATIVES OF PERSONS WITH DISABILITIES HAVE AGREED, UNDER STATE LEGISLATION, TO DESIGNATE A NUMBER OF STATIONS AS "KEY STATIONS" THAT WILL BE MADE FULLY ACCESSIBLE AS PART OF A STATION MODERNIZATION PROGRAM.

TO FURTHER ILLUSTRATE THE SCOPE AND DIVERSITY OF SERVICES FOR THE ELDERLY AND PERSONS WITH DISABILITIES THAT ARE BEING PROVIDED, I WOULD LIKE TO PROVIDE SOME DETAILS ON A NUMBER OF SUCCESSFUL, LOCAL PROGRAMS, BEGINNING WITH MY OWN SYSTEM IN READING, PENNSYLVANIA.

THE BERKS AREA READING TRANSPORTATION AUTHORITY (BARTA) DEVELOPED THE FIRST SPECIALIZED TRANSPORTATION SYSTEM IN PENNSYLVANIA AND THE THIRD SPECIALIZED TRANSIT SYSTEM IN THE UNITED STATES. BARTA SERVES A POPULATION OF 172,000 AND PROVIDES 1,300 RIDES EACH DAY THROUGH ITS PARATRANSIT PROGRAM. BARTA HAS 22 PARATRANSIT VEHICLES, FOURTEEN OF THE 22 VEHICLES ARE LIFT-EQUIPPED. BARTA ALSO USES THREE PRIVATE CONTRACTORS FOR PARATRANSIT SERVICES ON AN AS-NEEDED BASIS. BARTA RECENTLY PURCHASED FIFTEEN NEW BUSES FOR ITS FIXED ROUTES, AND TEN OF THESE BUSES ARE LIFT EQUIPPED.

THE SAN DIEGO METROPOLITAN TRANSIT DEVELOPMENT BOARD OVERSEES TROLLEY AND BUS SERVICES IN THE SAN DIEGO METROPOLITAN AREA. THE SAN DIEGO TRANSIT CORPORATION OFFERS FIXED ROUTE ACCESSIBLE SERVICE WITH 108 LIFT-EQUIPPED BUSES. SAN DIEGO TROLLEY INC. CURRENTLY HAS A 16 MILE LIGHT RAIL SYSTEM THAT IS FULLY ACCESSIBLE TO INDIVIDUALS WHO ARE ELDERLY OR DISABLED.

THIS SUMMER, AN ADDITIONAL SIXTEEN MILES OF LIGHT RAIL WILL BE ADDED TO THE SYSTEM. ALL OF THE LIGHT RAIL VEHICLES (71 AFTER THE SUMMER EXPANSION) ARE EQUIPPED WITH FEATURES THAT ALLOW PERSONS WITH DISABILITIES TO BOARD AND EXIT WITH EASE. EACH RAIL STATION IS ACCESSIBLE TO WHEELCHAIR USERS. PEOPLE WHO ARE VISUALLY

IMPAIRED ARE ASSISTED BY BRIGHTLY PAINTED AND TEXTURED PATHWAYS AND BANISTERS IN THE TICKET PURCHASE AREA. BENCHES ARE SPECIFICALLY DESIGNED FOR THOSE WHO HAVE AMBULATORY DISABILITIES. SENSITIVITY TRAINING IS PROVIDED TO TROLLEY OPERATORS SO THEY WILL HAVE A BETTER UNDERSTANDING OF THE NEEDS OF RIDERS WHO ARE ELDERLY OR DISABLED.

THE IOWA CITY TRANSIT AUTHORITY OFFERS COMPREHENSIVE TRANSPORTATION SERVICES FOR PEOPLE WITH DISABILITIES. AS PART OF A REGULAR FIXED ROUTE SERVICE THAT RUNS FIVE TIMES A DAY EVERY WEEKDAY, IOWA CITY TRANSIT TRANSPORTS INDIVIDUALS WITH DISABILITIES TO AND FROM THEIR JOBS. IOWA CITY TRANSIT CONTRACTS WITH THE JOHNSON COUNTY GOVERNMENT "SEATS" PROGRAM WHICH PROVIDES DOOR-TO-DOOR PARATRANSIT SERVICES FOR THOSE NEEDING TO USE LIFT EQUIPPED BUSES OR VANS. RIDERS WITH DISABILITIES CAN MAKE WEEKLY RESERVATIONS WITH "SEATS" FOR REGULARLY SCHEDULED TRIPS. IN FY 1988, "SEATS" PROVIDED 35,185 TRIPS FOR THESE PASSENGERS. IOWA CITY TRANSIT ALSO CONTRACTS WITH LOCAL TAXI COMPANIES IF "SEATS" IS UNABLE TO ACCOMMODATE A PERSON WITH DISABILITIES.

THE UNIVERSITY OF IOWA'S CAMBUS PROVIDES PUBLIC TRANSPORTATION TO UNIVERSITY STUDENTS. CAMBUS OFFERS REGULAR FIXED ROUTE SERVICES AND A PARATRANSIT SERVICE FOR PEOPLE WITH DISABILITIES. CAMBUS CURRENTLY HAS THREE LIFT EQUIPPED MINI BUSES THAT OFFER DOOR-TO-DOOR DEMAND RESPONSE SERVICES. IN FY 1988, 11,255 TRIPS WERE PROVIDED TO INDIVIDUALS WITH DISABILITIES, AND TEN PERCENT OF CAMBUS' BUDGET WAS USED TO PROVIDE THIS SERVICE.

LAST YEAR, THE DULUTH TRANSIT AUTHORITY IN DULUTH, MINNESOTA PROVIDED 25,000 PARATRANSIT TRIPS WITH FIVE LIFT EQUIPPED MINI VANS. ACCORDING TO THE TRANSIT AUTHORITY, RESIDENTS OF DULUTH PREFER THIS DOOR-TO-DOOR TRANSPORTATION BECAUSE THEY ARE OFTEN FACED WITH SEVERE WINTERS. LAST YEAR, EIGHTEEN PERCENT OF THE TRIPS TAKEN BY PASSENGERS WHO ARE ELDERLY AND DISABLED REQUIRED THE USE OF A WHEELCHAIR LIFT.

THE MEMPHIS AREA TRANSIT AUTHORITY (MATA) CONTRACTS ITS PARATRANSIT SERVICES WITH A LOCAL TAXI COMPANY. CURB-TO-CURB PARATRANSIT SERVICE IS PROVIDED BY TAXIS AND LIFT-EQUIPPED VANS TO MEET THE TRANSPORTATION NEEDS OF PEOPLE WHO ARE ELDERLY AND DISABLE. ON AN AVERAGE DAILY BASIS, MATA'S PARATRANSIT SYSTEM SERVES 485 PEOPLE WHO ARE ELDERLY AND DISABLED.

THE PACE PARATRANSIT SERVICE IN ARLINGTON HEIGHTS, ILLINOIS, IS THE SUBURBAN BUS DIVISION OF THE CHICAGO RTA. PACE MEETS THE MOBILITY NEEDS OF RIDERS WHO ARE ELDERLY OR DISABLED THROUGHOUT A 2,000 SQUARE MILE AREA OF SIX COUNTIES IN ILLINOIS. PACE HAS DIAL-A-RIDE DOOR TO DOOR, SUBSCRIPTION BUS AND SHARED-RIDE TAXI SERVICES. PACE LEASES MANY OF THEIR VEHICLES DIRECTLY TO LOCAL COMMUNITIES IN ORDER TO PROVIDE THE GREATEST AMOUNT OF FLEXIBILITY FOR COMMUNITIES TO TAILOR THE SERVICES TO THE SPECIFIC NEEDS OF THEIR RIDERS.

THE GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY (GCRTA) PROVIDES A DIVERSE PARATRANSIT SYSTEM FOR ITS PATRONS WHO ARE ELDERLY AND DISABLED. GCRTA OFFERED FOUR TYPES OF PARATRANSIT SERVICES. THE NEIGHBORHOOD SERVICE PROVIDES DOOR-TO-DOOR SERVICE WITH LIFT EQUIPPED AND LOW FLOOR RAMP EQUIPPED BUSES THROUGHOUT 18 NEIGHBORHOODS. GCRTA'S EXTRA-LIFT SERVICE PROVIDES SUBSCRIPTION SERVICE FOR INDIVIDUALS WHO ARE SEVERELY DISABLED PRIMARILY TO TRANSPORT THEM TO AND FROM WORK, COLLEGE, AND VOCATIONAL EDUCATION. RIDERS MAKE RESERVATIONS FOR REGULARLY SCHEDULED TRIPS. IN FY 1988, NEARLY 400,000 PASSENGER TRIPS WERE PROVIDED TO PEOPLE WHO ARE ELDERLY AND DISABLED.

FINALLY, SEATTLE METRO PROVIDES FIXED ROUTE ACCESSIBLE AND PARATRANSIT SERVICES. THIS NATIONALLY ACCLAIMED FIXED ROUTE BUS SERVICE HAS 773 LIFT-EQUIPPED BUSES. IN 1988, 139,000 RIDES WERE PROVIDED TO PEOPLE USING A LIFT. BY 1994, SEATTLE METRO EXPECTS THAT THEIR FIXED ROUTE BUS SERVICE WILL BE 100% LIFT-EQUIPPED.
IN ADDITION TO SEATTLE METRO'S FIXED ROUTE BUS SERVICE, A FIXED ROUTE VAN SERVICE IS PROVIDED, DOOR-TO-DOOR RESERVE A RIDE IS PROVIDED, AND PARATRANSIT TAXI SERVICES ARE PROVIDED. IN 1988, 148,000 DOOR-TO-DOOR TAXI TRIPS WERE PROVIDED TO PEOPLE WHO ARE ELDERLY AND DISABLED, AND INDIVIDUALS WITH LOW INCOMES AND WHO ARE ELDERLY AND DISABLED ARE ELIGIBLE FOR A 50% FARE SUBSIDY.
IN 1988, SEATTLE METRO DEDICATED OVER $2 MILLION TO SERVE PEOPLE WHO ARE ELDERLY AND DISABLED.

IN ADDITION TO OUR MEMBERS PROVIDING SERVICES TO PERSONS WITH DISABILITIES, APTA'S TASK FORCE SERVES ON THE NATIONAL STEERING COMMITTEE OF "PROJECT ACTION" (ACCESSIBLE COMMUNITY TRANSPORTATION IN OUR NATION). PROJECT ACTION IS A DIRECT RESULT OF A CONGRESSIONAL MANDATE TO BETTER ACCOMMODATE THE TRANSPORTATION NEEDS OF PEOPLE WITH DISABILITIES. THE THREE-YEAR CONGRESSIONAL PROGRAM HAS AUTHORIZED UP TO SIX DEMONSTRATION PROJECTS NATIONWIDE TO EVALUATE AND IMPROVE TRANSIT ACCESSIBILITY. THE NATIONAL EASTER SEAL SOCIETY IS ADMINISTERING THE THREE-YEAR, $3 MILLION PROGRAM. CONGRESS HAS EARMARKED FUNDS FOR UMTA RESEARCH AND TECHNICAL ASSISTANCE TO INITIATE PROJECT ACTION. THE PROJECT FOCUSES ON FIVE MAJOR CONCERNS OF PEOPLE WITH DISABILITIES AND LOCAL TRANSIT OPERATORS IN LOOKING TO IMPROVE TRANSIT.

MR. CHAIRMAN, AS YOU KNOW, THE SERVICES PROVIDED TO PERSONS WITH DISABILITIES ARE GOVERNED BY REGULATIONS ISSUED BY THE DEPARTMENT OF TRANSPORTATION. THERE IS ONE SECTION OF THOSE REGULATIONS WHICH I BELIEVE FULLY ILLUSTRATES THE STRENGTH OF THE EXISTING SYSTEM. THE REGULATIONS MANDATE PUBLIC PARTICIPATION AND COORDINATION IN THE PLANNING OF SERVICES FOR PERSONS WITH DISABILITIES. EACH COMMUNITY IS REQUIRED TO CONSULT, AS EARLY AS POSSIBLE IN THE PLANNING PROCESS, WITH "HANDICAPPED PERSONS" AND GROUPS REPRESENTING THEM IN ORDER TO IDENTIFY THE NEEDS FOR SERVICE IN THE AREA SERVED BY THE LOCAL TRANSIT AUTHORITY, ANY WEAKNESSES OR PROBLEMS IN EXISTING SERVICE AND THE TYPES AND CHARACTERISTICS OF SERVICE TO BE PROVIDED BY THE LOCAL TRANSIT AUTHORITY. THE REGULATIONS FURTHER PROVIDE THAT THE LOCAL TRANSIT AUTHORITY SHALL

PROVIDE A MECHANISM FOR CONTINUING PUBLIC PARTICIPATION IN THE DEVELOPMENT AND OPERATION OF ITS SYSTEM OF TRANSPORTATION FOR "HANDICAPPED PERSONS".

THE SIGNIFICANCE OF THIS REQUIREMENT, MR. CHAIRMAN, IS THAT SPECIFIC SOLUTIONS ARE NOT BEING MANDATED BY THE FEDERAL GOVERNMENT. RATHER, LOCAL TRANSIT AUTHORITIES, ALONG WITH THE LOCAL DISABLED COMMUNITY THAT THEY SERVE, ARE WORKING TOGETHER TO CREATE TRANSPORTATION PROGRAMS THAT ARE WORKABLE AND SUCCESSFUL AT THE LOCAL LEVEL.

MR. CHAIRMAN, THE MEMBERSHIP OF APTA IS AWARE OF ITS RESPONSIBILITIES TO CARRY OUT THE NATIONAL POLICY AS DIRECTED BY CONGRESS. IF CONGRESS CHOOSES TO MANDATE ALL OF THE REQUIREMENTS SET FORTH IN THE PROPOSED LEGISLATION CONCERNING MASS TRANSPORTATION SERVICES, WE WOULD URGE THAT IT PROVIDE FINANCIAL ASSISTANCE TO ENSURE THAT ITS MANDATES CAN BE CARRIED OUT. LIMITED FUNDING FORCES INCREASINGLY DIFFICULT CHOICES ESPECIALLY FOR SMALLER OPERATORS IN THE USE OF AVAILABLE RESOURCES TO PROVIDE SERVICES FOR PEOPLE WHO ARE ELDERLY AND DISABLED.

MR. CHAIRMAN, THIS CONCLUDES MY TESTIMONY.

STATEMENT OF
CHARLES A. WEBB
GENERAL COUNSEL
AMERICAN BUS ASSOCIATION

before the

SUBCOMMITTEE ON THE HANDICAPPED
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

on the

AMERICANS WITH DISABILITIES ACT OF 1989 (S. 933)

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to present the views of the American Bus Association on S. 933, the proposed Americans with Disabilities Act of 1989 (ADA).

The American Bus Association (ABA) is the national trade association for the intercity bus industry. ABA has approximately 700 operator members ranging in size from operators of two or three buses to Greyhound Lines, Inc., which has a fleet of some 4,000 buses.

We believe all Americans should be able to use all of the transportation services offered by the intercity bus industry. With but one exception, that right is honored by the industry today. Disabled Americans who are confined to wheelchairs should have access to intercity buses. That objective should be achieved in a way that does not destroy a substantial part of the intercity bus system.

Disabled Americans in wheelchairs have a right to utilize all types of intercity bus service on precisely the same basis as able-bodied Americans. That right can be fully respected without modifying all of the vehicles of all intercity bus operators.

As shown in a report just prepared for ABA by Robert R. Nathan Associates, Inc.,[1] the intercity bus industry provides regularly scheduled bus service to more than 10,000 communities. (Nathan Report, p. 17). By contrast, only 477 cities are served regularly by scheduled air carriers and only 498 cities are served by Amtrak.

Our purpose in presenting this statement is to support the basic concepts embodied in the proposed legislation and to explain its impact on intercity bus service and on the traveling public who depend on that service. These are predominantly low income riders (less than $10,000 per year) who account for 45 percent of intercity bus passenger miles (Nathan Report, p. 17), persons under the age of 18 and 65 or older who account for half of the intercity bus travel demand (Nathan Report, p. 20), and residents of rural America in or near at least 9,000 communities for which the intercity bus is the only form of public transportation.

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[1] The Impact of Federal Subsidies to Public Passenger Transportation Systems on Travel Demand, Modal Choice, and the Intercity Bus Industry, dated May, 1989.

BUS TRANSPORTATION COVERED BY THE PROPOSED LEGISLATION

Sections 303(a) and 401(3) of the ADA define "public transportation," as used in Titles III and IV, as transportation by bus that --

> provides the general public with general or special service . . . on a regular and continuing basis.

This language is taken directly from the definition of "mass transportation" in Section 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended. (49 U.S.C. 1608(c)(6)). The transportation covered by the definition is that which is both open to the public and provided on a regular and continuing basis. Included are the fixed-route services provided by transit buses in cities; intercity scheduled service over regular routes in over-the-road coaches; and bus transportation to destinations such as theme parks, racetrack and other sporting events, and points of historical or cultural interest provided seasonally or throughout the year but not necessarily over fixed routes.

Since charter bus service is not open to the general public, it does not fall within the definition of "mass transportation" in the Urban Mass Transportation Act, but charter service is specifically included in the definition of "public transportation" in Sections 303(a) and 401(3) of the ADA. Charter service is defined in essentially the same way by the Urban Mass Transportation Administration (49 C.F.R. 604.5(b) and by the Interstate Commerce Commission (49 C.F.R. 1054.2(a). In the UMTA charter service regulations, charter service is defined in pertinent part as follows:

> a group of persons who, pursuant to a common purpose and under a single contract . . . have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin. This definition includes the incidental use of UMTA funded equipment for the exclusive transportation of school students, personnel, and equipment. (49 C.F.R. 604.5(b)).

The following bus services are not covered by the ADA:

(1) Private bus transportation provided by a college or university for its students, by a church for its members, or by a social or service organization for its members; and

(2) Transportation of school children to and from school.

VEHICLES COVERED BY THE PROPOSED LEGISLATION

With one minor exception, the proposed legislation would cover all types of vehicles used in providing surface public transportation with the possible exception of taxicabs. Among the vehicles used by intercity bus operators that would be required to be "ready accessible to and usable by individuals with disabilities" would be --

(1) Vans, including those seating as few as eight or nine passengers;

(2) Trolley buses used primarily to showcase the attractions of a city to visitors and for weddings and other special events;

(3) Shuttle buses and minibuses with a seating capacity of 15 to 30 passengers;

(4) Conventional transit buses and over-the-road coaches; and,

(5) Conventional buses modified to seat as few as 16 to 20 passengers in order to provide a luxury-type service.

The only exception to this all-inclusive coverage is provided in section 401(7) of the bill. Under this exception, for example, a privately operated entity engaged only incidentally in the business of transporting passengers could operate vehicles having a seating capacity of 12 passengers or less without being subject to the vehicle accessibility requirements of the ADA.

COST OF THE PROPOSED VEHICLE

The following costs and losses of revenue would be incurred in bringing intercity buses into compliance with the accessibility requirements of the Act:

(1) Installation of Wheelchair Lifts --
$35,000 per bus

MCI Industries presently offers as a special feature on intercity coaches a wheelchair lift that costs approximately $35,000. Similar costs are estimated by Greyhound Lines, Inc., which uses both MCI and Eagle buses. Also, Massachusetts leases fully accessible buses to private operators for a charge that reflects its absorption of approximately $35,000 in bus modification costs.

(2) Maintenance of Wheelchair Lifts --
$2,000 a year (approx.)

This is a conservative estimate. Substantially higher maintenance costs have been experienced by some transit operators.

(3) Loss of Package Express Revenue --
$63.7 million a year (approx.)

Installation of a wheelchair lift on an MCI coach reduces the size of the luggage compartment from 330 to 205 cubic feet, a loss of 38 percent of the space available to transport baggage and package express. Since baggage by ICC regulation takes precedence over the transportation of express shipments (49 C.F.R. 1063.4(d)), the reduction in space available for package express would be substantially greater than 38 percent.

Assuming, however, that the reduction in luggage compartment space would reduce package express revenues by only 38 percent, the loss to Class I motor carriers of passengers would be approximately $63.7 million a year. The basis for this estimate is set forth in Appendix A.

(4) Loss of Seating Capacity Resulting from Making Restrooms on Buses Accessible to Wheelchairs

Bus aisles are only 14 inches wide In order to make a restroom on an intercity coach accessible to a wheelchair, it would be necessary to sacrifice 11 or 12 seats, approximately one-fourth of the seating capacity.

This loss of seating capacity could be avoided in only one of two ways. First, rest stops could be made at the request of disabled passengers in wheelchairs but this seems inconsistent with the ideological thrust of the proposed legislation. Secondly, restrooms could be removed from intercity buses but this would increase travel time and inconvenience passengers.

IMPACT OF THE PROPOSED LEGISLATION ON PARTICULAR SEGMENTS OF THE BUS INDUSTRY

(1) Regular-Route Carriers

Carriers providing scheduled service over fixed routes would be compelled to discontinue all or a substantial part of that service because of revenue losses resulting from the use of equipment mandated by the proposed legislation, coupled with a substantial increase in capital and operating costs.

The financial condition of the intercity bus industry is anemic. Since 1965, the industry has been in decline. The following facts are highlighted in the Nathan Report at page 14:

> Real net operating revenue, before income taxes, has declined 9.4 percent per year.
>
> In 1986, the most recent year for which data are available, the industry operating ratio was 96.9 percent. In 1965, the ratio had been 79.9 percent.
>
> * * * * *
>
> For Class I carriers, passenger revenue from intercity regular routes grew only 2.6 percent per year between 1970 and 1986.

Greyhound, the only nationwide motor carrier of passengers, has indicated that its survival would be seriously threatened by passage of the bill. The outlook for smaller bus companies having a substantial regular-route operation would be even more bleak. Since they are feeders into the Greyhound system, they depend on Greyhound's nationwide network for the transportation of passengers beyond a particular State or region.

Private unsubsidized bus operators cannot commit capital to regular-route operations which are hopelessly unprofitable. The ultimate cost of the proposed legislation would be paid in loss of service to most or all of the at least 9,000 communities where the intercity bus is the only form of public transportation and in the loss of service to persons who, although able-bodied, have limited access to public transportation because of rural residence or poverty-level income, or both.

(2) Charter Bus Operators

The proposed legislation would not apply to entities not engaged in for-hire transportation. The higher capital and operating costs imposed on charter bus operators would divert a substantial amount of traffic to private carriage. Colleges and universities, churches, service and social organizations, employers, and others would have a strong incentive to provide their own charter service with their own equipment and their own drivers.

This shift of charter traffic from the for-hire to the not-for-hire sector would be detrimental to motor carrier safety because less use would be made of full time professional drivers.

Additional business would be lost by private charter bus operators to local public transit authorities, not because they are more efficient operators, but because the costs mandated by the proposed legislation would be paid for them by Federal and local governments. Many charter bus operators cannot afford to pay for such increased costs themselves and such costs could not be passed on to their customers who could not afford to pay for them either.

(3) School Bus Operators

Many school bus contractors, including some members of ABA, transport school children to and from school in school buses. The buses may also be used to provide local charter service on weekends and at other times when the buses are not used in school work. Obviously, no school bus contractor will spend $35,000 to install a wheelchair lift on a school bus in order to use the bus in incidental local charter service. The end result would be loss of income for school bus contractors and, possibly, increases in the cost of transporting school children to and from school.

(4) Special Operations

Many disabled persons are transported in smaller vehicles -- vans and minibuses -- designed to accommodate wheelchairs. These smaller vehicles along with limousines are also used by private entities in providing numerous specialized transportation services. Shuttle service is provided, for example, to and from airports, hotels, and convention centers.

There is no apparent way in which small vehicles can be modified to transport disabled persons in wheelchairs in the same vehicle with other passengers and remain competitive with the operation of small vehicles in private carriage.

LET US REASON TOGETHER

Members of ABA are no less compassionate toward disabled Americans than sponsors of the proposed legislation. Neither bus operators nor the disabled would derive any gain from the destruction of a large part of the intercity bus industry. Many of the less affluent members of our society indeed would suffer.

We are willing to meet at any time and as often as necessary with promoters of the legislation and with the staff of concerned Senate committees to explore ways to improve the access of disabled Americans to intercity bus transportation services.

With respect to scheduled intercity bus service, we urge that the Massachusetts bus lease program be studied to ascertain whether it could be adopted to scheduled bus operations nationwide. Massachusetts leases intercity coaches equipped with wheelchair lifts to intercity bus operators for a period of seven years. After seven years they are auctioned off. Lease payments are set at a level which imposes the cost of the lift equipment on the State. If the costs of bus modification and maintenance can be shared on some equitable basis by Federal, State, and local governments and by intercity bus operators, one of the prime objectives of the ADA might be accomplished.

Accessibility to buses used in intercity charter services seems to us to be an easier problem to solve. In the first place, charter trips usually are planned well in advance and carriers can be notified if special arrangements are required for disabled members of the group. Also, the chartering party controls the bus. It can demand, for example, that rest stops be made at such times and places as it deems desirable to meet the needs of particular individuals in the group.

Finally, fully accessible buses are already available for charter service and more will be coming on line. UMTA's charter service regulations published on April 13, 1987 (49 C.F.R. Part 604) and amended on December 30, 1988 (53 Fed. Reg. 53348) provide for cooperation between public and private bus operators in handling requests for charter service by groups having one or more disabled members. Transportation for such groups may be provided directly by UMTA grantees using UMTA-funded buses. (49 C.F.R. 604.9(b)(5)(i)). If a private bus operator requires the use of a fully accessible bus to accommodate a disabled member of a charter group, UMTA regulations provide that its grantees many lease UMTA-funded buses to private charter operators if they are "unable to provide equipment accessible to elderly and handicapped persons." (49 C.F.R. 604.9(b)(2)(i)).

The cooperative arrangements of public and private bus operators in meeting the transportation needs of disabled persons have worked well. We are not aware of any person who has been excluded from a charter trip because a fully accessible bus was not available.

Finally, it is not necessary to make all of the charter buses and all of the smaller vehicles of intercity bus operators fully accessible in order to insure that all disabled Americans in wheelchairs have the ability to use charter buses and smaller vehicles on exactly the same basis as able-bodied Americans.

ABA deeply appreciates this opportunity to present its views on the proposed Americans with Disabilities Act of 1989.

APPENDIX A

ESTIMATED LOSS OF PACKAGE EXPRESS REVENUE RESULTING FROM THE INSTALLATION OF WHEELCHAIR LIFTS ON INTERCITY COACHES

(1)	Operating Revenues of Class I Intercity Motor Carriers of Passengers in 1986 (1987 Annual Report of the Interstate Commerce Commission, p. 130)	$1,117,320,000
(2)	Package Express Revenue (typically 15% of total operating revenues but shown to be 16.1 percent in 1982 in The Intercity Bus Industry ICC Office of Transportation Analysis, January, 1984, p. 8)	167,598,000*
(3)	Loss of Package Express Revenue Attributable to Loss of 38% of Cargo Space	63,683,820

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* Total revenues from the transportation of package express by all motor carriers of passengers in 1987 were estimated to be $177 million in Transportation in America, Transportation Policy Associates, 6th ed., March, 1988, p. 11.

Prepared Statement of Timothy M. Cook

Although there are many important provisions contained in the Americans with Disabilities Act, none are more important than the portion that would guarantee accessible transportation for persons with disabilities. It is that provision of the bill that I would like to address this afternoon.

As the Director of the National Disability Action Center, an advocacy organization representing persons with disabilities, I have had the opportunity to see, first-hand, the effect of exclusionary transportation policies on persons with disabilities. I have represented disability rights organizations and individuals with disabilities in several cases concerning recalcitrant transit systems and federal agencies that have insisted upon retaining their privilege to continue to exclude us.[1]

Access to transportation particularly has become the rallying cry of the burgeoning disability civil rights movement across the country.

In the past, it didn't seem to matter as much. Persons with severe disabilities frequently were sent off to a lives of segregation at isolated institutions. Others were hidden at home. Children and young adults with disabilities were fortunate if they received some education for a few hours a week in someone's basement, let alone be hired for a job when they reached adulthood.

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[1] My experiences as a disability civil rights lawyer over the past decade are detailed more fully in the attached curriculum vitae.

In the 1970s, however, persons with disabilities began building on the experience of other minorities, seeking an end to segregated, inadequate, exclusionary public services. We went to the Congress and to the state legislatures, and laws were enacted to eliminate architectural and transportation barriers we faced in some facilities, such as those that were built with federal assistance, to require public schools to accept students with disabilities, to provide a modicum of attendant services, and to establish independent living centers around the country, managed by persons with disabilities.

As a result, there are today millions of persons with disabilities who have attended public school, and who are living in their own accessible houses and apartments that their local independent living center may have helped them find and renovate. We have the training and the skills to work at challenging, well-paying jobs and to lead lives of dignity and independence.

Persons with disabilities desire to work. The problem is we often have no means of transportation to get there. Nor are we able to get to educational and training opportunities. And forget about recreational and social events.

If you have a disability necessitating the use of a wheelchair for mobility, in most cities you still cannot ride public transit buses to training programs, to work, or even to a favorite restaurant. You are relegated to "special service," segregated, paratransit vans that must be reserved several days in advance, without possibility of later changing the reservation. If you rely upon paratransit, you'll also find that it doesn't cover the same geographic area as the bus system. Nor are you permitted to bring companions along on the paratransit vans, making it impossible to travel with a spouse or parent or child or friend to and from your destination -- you must arrange to meet them there. If you are fortunate enough to reserve a paratransit ride to the place you need to get to, you probably will be charged a higher fare. Paratransit services have a well-earned reputation for not coming on time. And you'll have to go home early, since most paratransit systems shut down at 8 or 9 p.m.

But the greatest evil of forcing persons with disabilities to use paratransit is not that it takes away all spontaneity from our lives. Even if paratransit were not an inherently unequal system, it would still be immoral and wrong to relegate us to those services because they are segregated.

As Rosa Parks taught us, and as the Supreme Court ruled thirty-five years ago in Brown v. Board of Education,[2] segregation "affects one's heart and mind in ways that may never be undone. Separate but equal is inherently unequal."

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[2] 347 U.S. 483 (1954). In Brown, the Supreme Court overruled its previous decision in Plessy v. Ferguson, 163 U.S. 537 (1896), which had upheld the constitutionality, under the Equal Protection Clause of the Fourteenth Amendment, of a

What better opportunity for people without disabilities to learn about our disabilities than to ride the mainline transit system with us? Forcing those of us who are able to use lift-equipped buses onto a separate transportation system stigmatizes us, demeans us, and subjects us to discrimination. The two steps up to the bus represent by far the greatest barrier to mainstreaming facing this country's citizens with disabilities.

Aside from the moral imperative, providing accessible public transit for persons with disabilities makes good economic sense. If you talk to any vocational rehabilitation counselor in this country, they uniformly will tell you that the chief reason for the 68% unemployment rate for persons with disabilities is the lack of accessible transportation.

Lifts on buses translate into substantially less public benefits paid to unemployed and underemployed persons with disabilities, and far greater taxes collected from newly employed persons with disabilities who finally will have a way of getting to work. Indeed, the United States Commission on Civil Rights has projected that approximately $800 million in economic

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racially segregated transportation system in Louisiana under the "separate but equal" doctrine.

benefits would accrue to the American economy if only transportation barriers were eliminated.[3]

* * *

The struggle to obtain accessible transportation has been a hard and long one for persons with disabilities. Congress sought to address many of these issues when it enacted the Urban Mass Transit Act of 1970.[4] As a condition for the receipt of the billions of dollars in federal assistance provided to transit systems, persons with disabilities were guaranteed "the same right" to utilize mass transportation services.

The U.S. Department of Transportation (DOT) failed to enforce that requirement, so the Congress reiterated it, in even stronger and clearer terms, in the Federal Aid-Highway Act Amendments of 1974, expressly requiring that all new "equipment" and "projects" be accessible to persons with disabilities.[5]

In the meantime, Congress also enacted Section 504 of the Rehabilitation Act,[6] which broadly prohibited all federal grantees from excluding persons with disabilities from their activities.

In 1979, DOT Secretary Brock Adams finally issued mandatory rules requiring that all new buses be accessible. DOT based this requirement on comprehensive factual findings, including the finding that public transit buses are "the most widely used means of public transit."[7] DOT extensively discussed the costs and benefits of requiring all new vehicles to be accessible and found that:

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[3] U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983).

[4] § 16(a), 49 U.S.C. § 1612(a).

[5] § 105(b), amending § 165(b) of the Federal Aid-Highway Act of 1973, 23 U.S.C.A. § 142 note.

[6] 29 U.S.C. § 794.

> In most communities, bus systems provide the only fixed route means of public transportation. The accessibility of bus systems to the handicapped is crucial if handicapped people in these communities are not to be denied the benefits of Federal aid to urban mass transportation. Even in cities with other modes of mass transit, the bus system -- which normally has a much more comprehensive route structure than rail and other means of transportation -- is a key to ensuring that handicapped people have an equitable opportunity to use transportation services.[8]

Discussing the potential market to be served, the Secretary found that there were:

> [A]bout 1.5 million who live within a half-mile of a bus stop and for whom bus steps are a barrier which would prevent them from using buses. Given the increase in the average age of the population, it is likely that the number and proportion of mobility-handicapped people will increase, because as people age, the likelihood that they may become mobility-handicapped increases. . . . We believe that the use of accessible bus service by handicapped people will increase over time. Given the history of almost total inaccessibility, most handicapped people probably do not think first of the city bus when they make transportation plans. It is necessary to create accessible service and educate the public about it before the significant potential market of handicapped users is likely to ride the buses in large numbers. The Department is persuaded that, under this rule, and with the cooperation of transit operators, mainline bus service can be safe, convenient, and attractive for handicapped persons.[9]

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[7] 44 Fed. Reg. 31,442 (1979).

[8] Id. at 31,455.

[9] Id. at 31,456-57.

In order to alleviate the costs to DOT grantees of providing accessible bus service, the Secretary established a phase-in period "during which new accessible buses can be purchased to make a fleet accessible by accretion."[10] This would, the Secretary concluded, keep costs to transit systems "within reasonable bounds"[11]:

> The capital cost impact of this portion of the regulation will therefore consist principally of incremental costs of lift-equipped buses over the costs of inaccessible new buses. This cost appears to be within reasonable bounds. The marginal increase in operating costs is estimated to average about 1.3 percent.[12]

DOT also extensively discussed and flatly rejected the contention of members of the transit industry that commented on the rule, that lift-equipped buses would slow service, would be unsafe or would be unreliable, and concluded that "lifts are a feasible solution to the problem of making buses accessible."[13]

The nation's transit systems were not pleased at this regulation. They enjoyed the new buses purchased with federal money. But providing disability access would take away some of those precious federal dollars. Besides, "normal" passengers might be offended if they had to ride the bus with funny-looking persons with disabilities.

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[10] Id. at 31,455.

[11] Id.

[12] Id. at 31,456. DOT additionally stressed that "the Department's decisions ... cannot be exclusively tied to cost benefit analysis. The human value of providing accessible transit services to all persons must weigh heavily in the decision." Id. at 31,459.

[13] Id. at 31,457. The Secretary's conclusions have been borne out by the uniformly positive experience of transit systems throughout the country -- Seattle, New York City, Denver, Atlanta, and Johnstown, Pa., to name a few -- that have made the commitment to access, successfully, even in climates that frequently are cold or rainy.

So, the transit systems went to court to block the regulation. At first, the validity of the regulation was upheld by a United States District Court, ruling that transit systems must take the opportunity provided by new purchases to build accessible transit systems. In a 1981 appeal, however, the government informed the court that the new administration now was reviewing the rules with an eye toward permitting transit systems to comply with all of their duties under federal disability civil rights laws solely by providing a modicum of segregated paratransit.[14]

When the court remanded the regulation to DOT, the agency swiftly, within 45 days, attempted to take that opportunity to abrogate all of the requirements that buses be accessible. It is important to recognize that this action was taken _not_ because there was any disagreement with the administrative factual findings made by the previous Secretary that accessible buses were essential for persons with disabilities, and feasible for transit systems to employ. The 1979 requirements were abrogated solely because the newly installed Secretary of DOT disagreed as a matter of policy with the requirements of the 1979 rule. As the new Secretary explained:

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[14] _See American Public Transit Ass'n v. Lewis_, 655 F.2d 1272, 1280 n. 14 (D.C.Cir. 1981).

> Early in this Administration, the Department identified its accessibility requirements as requiring priority review and began that review. The Presidential Task Force on Regulatory Relief . . . identified the mass transit requirements . . . as one of the Federal government's costly and controversial regulations deserving priority review. . . . As a result of this review, the Department established a clear policy on this issue: ensuring the provision of transportation that handicapped persons can use is an obligation of recipients of Federal assistance for mass transit, but the major responsibility for deciding how this transportation is to be provided should be returned to local communities. Both our legislative proposal and regulatory changes are based on this policy.[15]

Congress refused to enact DOT's "legislative proposal" to codify the "local option" policy.[16] Congress instead, in a floor amendment to the Surface Transportation Assistance Act of 1982 (STAA),[17] required DOT to "establis[h] minimum criteria for the provision of transportation services to handicapped and elderly individuals by recipients of Federal financial assistance." The amendment required that regulations be issued within 180 days, and that they be "consistent with any applicable government-wide standards for the implementation of § 504."[18]

In stark contrast to the rapidity with which it had abrogated the 1979 rule, DOT failed to meet the 180-day deadline imposed by § 317(c), forced the disabled community to wait an additional 3-1/2 years, and then only issued a rule after being ordered by a federal court to do so.[19]

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[15] 46 Fed. Reg. 37,488 (1981).

[16] See id.

[17] § 317(c), 49 U.S.C. § 1612(d).

[18] Id.

And when the new regulation did come out it still permitted transit systems to relegate riders with disabilities to inadequate, segregated paratransit. In addition, transit systems were absolved of all responsibility for providing access so long as they spent a minimum of three percent of their budgets on disability access.[20]

* * *

This time it was the disability community's turn to challenge the regulation in court. Twelve disability civil rights organizations, led by Americans Disabled for Accessible Public Transportation (ADAPT), requested a federal court to strike down the cost cap and require that all new buses purchased by transit systems be accessible.

In a decision issued on February 13, 1989, ADAPT v. DOT,[21] the disability community won the victory we had been seeking for a long time. The U.S. Court of Appeals for the Third Circuit ruled that new buses purchased with federal assistance are to be accessible to persons who have mobility impairments, including wheelchair users. The Court of Appeals also eliminated the three percent cost cap on services for persons with disabilities.

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[19] See Maine Ass'n of Handicapped Persons v. Dole, 623 F.Supp. 920 (D. Maine, 1985).

[20] 51 Fed. Reg. 18,994 (1986).

[21] 867 F.2d 1471 (3d Cir.1989).

No retrofitting of any buses with wheelchair lifts was required; the ruling only applied to future purchases. The Court said that because transit systems may phase-in accessible buses as new vehicles are purchased, the ruling would not lead to undue financial burdens for any transit systems. The Court stated:

> "Only a mixed-system of lift-equipped buses for those able to utilize them and a paratransit system for those who cannot will adequately implement the statutory mandates."[22]

The Court correctly stated that a segregated paratransit system alone would always result in "uneven treatment to the disabled," not only because it is segregated, but also because by its nature it "deprives the handicapped of spontaneous activity, whether it be of an emergency, business, or pleasurable nature."[23]

The court recognized that, unlike paratransit, which requires unchangeable reservations well in advance, mainline access enables persons with disabilities to go to the nearest bus stop and board the next bus to come along, just like everyone else.

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[22] Id. at 1473.

[23] Id. at 1485. Similarly, the Chief Administrative Law Judge of the Illinois State Human Rights Commission recently determined in a decision requiring the Chicago transit system to purchase 600 accessible buses that "be it eight hours or twenty-four, the [paratransit] reservation requirement eliminates the possibility of spontaneous activity. It also greatly diminishes, if not eliminates, the disabled rider's ability to adjust to unexpected emergencies or simply changes in plans beyond his/her control." Jones v. Chicago Transit Authority, Charge Nos. 1984CP50, -49, -52, -47, -84, -54, Interim Recommended Order and Decision (Jan. 15, 1988), p. 107.

The Court of Appeals also properly determined that a requirement that newly purchased buses be accessible "does not exact a fundamental alteration to the nature of mass transportation," nor would it impose any "undue financial burdens" on any transit systems.[24] In view of the major benefits that accessible transportation will bring to persons with disabilities, and to the American economy as a result of diminished unemployment and underemployment among persons with disabilities, the costs of providing access to transportation are minimal.[25]

The national disability community immediately hailed this decision as an important milestone for disability civil rights. At the same time, there was significant trepidation that DOT would appeal the decision in an attempt to have it reversed. Others believed that the decision would not be appealed, especially since President Bush had promised the disability community during the fall campaign, and most recently, just four days before the ADAPT decision, in his February 9 speech before the joint session of the Congress, that he wanted to bring persons with disabilities into "the economic mainstream":

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[24] Id. at 1473.

[25] The cost of equipping newly purchased buses with lifts is about $10,000 per bus. Since, by statute, eighty per cent of that cost is paid for with federal assistance (see 49 U.S.C. §§ 1602, 1604), the actual cost to transit systems to enable persons with disabilities to get on the bus is only $2,000 per bus, far less than the expense of providing extra comforts, such as air conditioning, to passengers once they already are aboard.

> "I believe in a society that is free from discrimination and bigotry of any kind. I will work to knock down the barriers left by past discrimination and to build a more tolerant society that will stop such barriers from ever being built again. . . . To those 37 million Americans with some form of disability: You belong in the economic mainstream. We need your talents in America's workforce. Disabled Americans must become full partners in America's opportunity society."[26]

President Bush made similar statements on several occasions during the campaign, including his acceptance speech in New Orleans, his closing statement during the second debate with Governor Dukakis, and in the national spot that ran on the networks on election eve.

Many persons with disabilities felt that this was just more rhetoric when the administration filed its appeal and the Court of Appeals agreed to rehear the case on May 15. The government continues to argue in its appeal that federal law provides persons with disabilities no right to federally assisted services that would integrate us, and that transit systems can meet all of their duties under federal disability rights laws by providing segregated paratransit services, with all of their inadequacies.

* * *

The Americans with Disabilities Act would provide persons with disabilities the civil right that we so urgently need, the right to utilize the regular transportation system. The Act would clarify what § 504 of the Rehabilitation Act of 1973, § 16(a) of the Urban Mass Transportation Act, and § 105 of the

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[26] Washington Post, Feb. 10, 1989.

Federal Aid-Highway Act Amendments already require: That all new or newly altered transportation facilities be made accessible to persons with disabilities, to the maximum extent feasible. Additionally, paratransit is to be made available as a supplemental service, for those who may be unable to utilize lift-equipped buses or accessible train systems.

The Act is needed, despite the well-reasoned decision of the Court of Appeals in ADAPT v. DOT, because DOT continues to fight that decision on appeal. DOT needs to be told, once and for all, loud and clear, that the Congress means what it has said, and that no new public transportation facilities are to be purchased or built in this country unless they are accessible. Thus, the Act would codify the reasoning of the ADAPT decision.

In order to reduce the costs to transit systems, the Act does not require the retrofitting of a single vehicle. Only new or remanufactured vehicles must be accessible. This means that the disability community will have to wait an additional 12 years before we have a fully accessible system. But that is a compromise we are willing to make in order to obtain a transportation system that we and future generations of persons with disabilities will be able to utilize.

In terms of train systems, many in the disability community are disappointed that the Act does not include a requirement of eventual accessibility for all train stations. Instead, the Act would only require "key" existing stations to be rendered accessible, and that at least one car per train be accessible.

However, it would require all new train cars and all new or newly altered stations to be accessible, regardless of whether they are labeled "key." Once again, this is a significant compromise, especially given how long we already have waited for access to transportation.

* * *

The provisions of the Americans with Disabilities Act that would guarantee us access to transportation are not simply a good idea. They are essential to the lifeblood of the disability community in this country. It is a civil right whose time has come.

TIMOTHY M. COOK
The National Disability Action Center
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(202) 467-5730

BIRTHPLACE AND DATE: Pittsburgh, PA, August 14, 1953

PROFESSIONAL EXPERIENCE

National Disability Action Center, Washington, DC (1988-present): Director. Responsible for all operations of disability civil rights advocacy organization, representing persons with disabilities seeking effective, meaningful, and integrated community services such as housing, education, and transportation.

Public Interest Law Center of Philadelphia (1984-1988): Attorney, Disabilities Project, responsible for all aspects of complex class action constitutional and statutory litigation on behalf of disability rights organizations and their members.

Western Law Center for the Handicapped, Los Angeles, CA (1983-84): Director, responsible for administration and litigation conducted by foundation-supported public interest law firm, representing handicapped persons in the courts and before administrative agencies in matters involving public benefits and civil rights.

Civil Rights Division, U.S. Department of Justice, Washington, DC (1980-83): Trial attorney, Office of Special Litigation, responsible for investigations and litigation in eleven states, to enforce the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. § 1997 (conferring upon the Attorney General the authority to litigate the constitutionality of conditions of confinement of disabled people in state institutions); and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (the Disabled Persons' Civil Rights Act).

Antioch School of Law, Washington, DC (1981-82): Adjunct Professor of Law, responsible for portions of the clinical program in addition to an academic seminar, "The Civil Rights of Disabled Persons."

Law Clerk, Honorable Dudley B. Bonsal, United States District Judge, Southern District of New York (1979-80): Assisted with drafts of opinions, memoranda, and jury charges; prepared bench memoranda and drafts of opinions assigned to the Judge sitting on the Temporary Emergency Court of Appeals and by designation of the Courts of Appeal for the 1st, 2d, and 9th Circuits.

TIMOTHY M. COOK

Reginald Heber Smith Community Lawyer Fellow (1978-79): Law Reform Unit, Legal Aid Society of New York City. Established a Disability Rights Litigation Project, responsible for class action suits involving discrimination in employment and education. Also assigned weekly to intake for Legal Aid's general clientele, responsible for all aspects of client counseling from intake interviews through trials and appeals.

Office for Civil Rights, Department of HEW, Washington, DC (summer, 1977): Developed guidelines to interpret a newly promulgated regulation to enforce Section 504 of the Rehabilitation Act; provided technical assistance to aid federal grantees' regulatory compliance; trained equal opportunity specialists to investigate complaints of handicap discrimination.

Center for Law and Social Policy, Washington, DC (January-May, 1977): Law school externship assisting CLASP attorneys in class action cases concerning exclusionary practices of health and social service agencies.

EDUCATION

University of Pennsylvania Law School, J.D. 1978, Jefferson Fordham Human Rights Award, National Moot Court Team, Student Government.

University of Pennsylvania Graduate School of Arts & Sciences, M.A. 1975, Thesis on "Value Systems and Group Conflict and Cohesion in American History: The Philadelphia Political System, 1828-32, as a Test Case."

University of Pennsylvania College of Arts and Sciences, B.A. 1975, *magna cum laude*, Honors in American History, Pi Gamma Mu -- National Social Sciences Honor Society, President of the Varsity Debate Team, Student Government Finance Committee, Chairperson of the International Affairs Association, University Judiciary, Student Committee for Disability Rights, Sphinx Senior Society.

TIMOTHY M. COOK

SELECTED CASES

Counsel for plaintiffs or amici curiae in the following representative reported cases:

School Board of Nassau County, Fla. v. Arline, 107 S.Ct. 1123 (1987). Coverage of contagious handicaps under § 504. Counsel for the American Diabetes Ass'n, et al.

Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986). The "Baby Doe" case. Counsel for the American Coalition of Citizens with Disabilities, et al.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The first occasion for Supreme Court interpretation and application of the Equal Protection Clause to classifications based upon retardation. Counsel for the Association for Retarded Citizens/U.S. and seventeen national and state disability organizations.

Alexander v. Choate, 469 U.S. 287 (1985). The Supreme Court's richest analysis of the legislative history of § 504. Counsel for the Association for Severely Handicapped Persons, et al.

Irving Independent School District v. Tatro, 468 U.S. 883 (1984). The Supreme Court's first case concerning the related services requirements of the Education of the Handicapped Act, 20 U.S.C. §§ 1401-15. Counsel for the Spina Bifida Ass'n.

Southeastern Community College v. Davis, 442 U.S. 397 (1979). First Supreme Court interpretation of § 504. Counsel for the New York City Mayor's Office for the Handicapped, et al.

Americans Disabled for Accessible Public Transportation (ADAPT) v. Burnley, 867 F.2d 1471 (3d Cir. 1989), rev'g 676 F. Supp. 635 (E.D.Pa.1988). Requiring all transit vehicles in the United States newly purchased with federal assistance to be accessible to persons with disabilities, and striking down a Department of Transportation rule permitting transit systems to comply with disability access requirements solely by providing a segregated paratransit system. Counsel for ADAPT and twelve other disability rights organizations.

DeVries v. Fairfax County Public Schools, 853 F.2d 264 (4th Cir. 1988). Procedural rights to a private right of action without exhaustion of administrative remedies, under the Education of the Handicapped Act. Counsel for Appellant, a student with autism.

TIMOTHY M. COOK

Disabled In Action of Pennsylvania v. Sykes, 833 F.2d 1113 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 1293 (1988). Rights of mobility disabled people to accessible subway stations. Counsel for plaintiff class.

Clark v. Cohen, 794 F.2d 79 (3d Cir.), *cert. denied.* 107 S.Ct. 459 (1986). Rights of institutionalized persons to community services. Counsel for the Penna. Ass'n for Retarded Citizens.

Disabled In Action of Pennsylvania v. Pierce, 789 F.2d 1016 (3d Cir. 1986). Class action enforcing the architectural accessibility requirements of § 504 against the U.S. Dep't of Housing and Urban Development. Counsel for plaintiff class.

Homeward Bound v. Hissom Memorial Center, ____ F.Supp. ____ (N.D. Okla. 1987), appeal argued November 15, 1988 (10th Cir.). Conducted 33-day trial culminating in a decision and order requiring the State to establish community-based residences and services for several hundred members of a certified class, and requiring the ending of unnecessarily segregated services for severely disabled Oklahomans. Counsel for plaintiff class.

Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985). Counsel for U.S. Dep't of Justice as amicus supporting blind welfare caseworkers seeking reader services.

United States v. Baylor University Medical Center, 564 F. Supp. 1495 (N.D. Tex. 1983), *aff'd*, 736 F.2d 1039 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). Counsel for Government in case of first impression regarding coverage of Medicare- and Medicaid-funded programs under civil rights legislation affecting recipients of federal financial assistance.

New York State Association for Retarded Children v. Carey, 551 F. Supp. 1165 (E.D. N.Y. 1982), *aff'd in part*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). The "Willowbrook" case. Counsel for Dep't of Justice as litigating amicus supporting plaintiffs.

Jones v. Illinois Department of Rehabilitative Services, 504 F. Supp. 1244 (N.D. Ill. 1981). Counsel for Department of Justice as amicus in case establishing requirements for state vocational rehabilitation agencies.

Chaplin v. Consolidated Edison Corp., 482 F. Supp. 1165 (S.D. N.Y. 1980). One of a very few district courts to be persuaded to imply a private right of action challenging exclusionary employment practices of federal contractors under § 503 of the Rehabilitation Act. Counsel for the plaintiff class.

ADMINISTRATIVE REPRESENTATION

Counsel to disabled individuals in a variety of administrative proceedings including social security disability, vocational rehabilitation, and right-to-education hearings.

PUBLICATIONS

"Community Services Litigation," chapter in President's Committee on Mental Retardation, The Mentally Retarded Citizen and the Law (1988).

"For Wheelchair Users, A Ticket to Ride", The Progressive, Vol. 52, No. 5, (May, 1988, p. 27).

"Handbook on Access to Public Accommodations for Disabled People Under Federal Access Laws" (1988).

"The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws," Symposium Issue on Disability Rights, 20 Loyola L.A. L. Rev. 1471 (1987).

"Courts Strike Blows to State-Supported Segregated Services for Disabled Persons," 11 Mental & Physical Disability L. Rep. 358 (1987).

"A Dangerous Intrusion Into Private Lives," Op.-Ed. Column, The Philadelphia Inquirer (July 22, 1987), p. 19-A.

"Handicapping the Disabled," Op.-Ed. Column, The Washington Post (Sunday, May 13, 1984), p. C-1.

"Coverage of Employment Discrimination Under the Rehabilitation Act," 19 Wake Forest L. Rev. 581 (1983)(co-author).

"The Substantive Due Process Rights of Mentally Disabled Persons," 7 Mental Disability L. Rep. 346 (1983).

"Providing an Effective Education for Handicapped Children," 18 Trial, No. 9, p.71 (1982)(co-author).

"Equality of Opportunity for Higher Education for Disabled Students," 15 Harvard Civil Rights - Civil Liberties L. Rev. 415 (1980)(co-author).

TIMOTHY M. COOK

"Better Times Ahead for Disabled Students," 182 New York Law Journal, No. 37, p.1 (1979).

"The Provision of Health and Rehabilitation Services to Disabled Persons," 12 Clearinghouse Rev. 693 (1979).

"Nondiscrimination in Employment under the Rehabilitation Act of 1973," 27 American U. L. Rev. 31 (1977).

Legal Affairs Columnist for Mainstream, a monthly periodical with a national circulation that reports on events of interest to disabled people.

TESTIMONY, TRAINING PRESENTATIONS, AND ADDRESSES

President's Committee on Employment of Persons with Disabilities, Annual Meeting, Multi-Modal Transportation and Access to Employment, Tampa, FL (May 11, 1989).

Maryland State Planning Council on Developmental Disabilities, Annual Conference, Fixed Route Transit: The Latest Victory and Future Challenges, Baltimore, MD (April 28, 1989).

Tennessee Institute on Special Education Law and Practice, Comparing the Obligations of Educators under § 504 of the Rehabilitation Act and the Education of the Handicapped Act, Nashville, TN (April 24, 1989).

The Ass'n for Persons with Severe Handicaps, Annual Conference, The Right to Accessible Public Transportation, Washington, DC (December 13, 1988).

National Legal Aid and Defenders Ass'n, Annual Meeting, Workshop on Ending the Segregation of Disabled People, Miami, FL (December 3, 1987).

Spina Bifida Ass'n, Annual Conference, The Rights of People with Spina Bifida to Accessible Transportation, Philadelphia, PA (November 14, 1987).

Senate Committee on Human Resources, Oklahoma State Legislature, Oklahoma City, Oklahoma, Assessment of Retardation Services in Oklahoma (October 15, 1987).

Disabilities Section, National Legal Aid and Defenders Ass'n, Disability Rights Training Conference for Lawyers, Austin, TX (September 21, 1987).

National Conference of Independent Living Centers, Washington, DC (May 10, 1987).

Loyola Law School, National Disability Rights Conference, Los Angeles, CA, Keynote Address (November 13, 1986).

Disability Rights Education and Defense Fund, National Caucus on Disability Issues, Washington, DC (June 23, 1986).

Equal Employment Opportunities Commission, Disability Rights Training for Equal Opportunity Specialists, Philadelphia, PA (November 3, 1985).

United Together, National Conference, Washington, DC (September 15, 1985).

President's Committee on Mental Retardation, The Future of Community Services Litigation, Cincinnati, OH (March 26, 1985).

Applied Behavior Systems, Deinstitutionalization and Community Programming, Valley Forge, PA (November 30, 1984).

Pennsylvania Coalition of Citizens with Disabilities, Annual Conference, Hershey, PA (October 20, 1984).

Protection and Advocacy of Mississippi, Client Advocacy Conference, Jackson, MS (September 12, 1984).

International Association for Professional Women, Disability Training for Personnel Administrators, Los Angeles, CA (March 8, 1984).

Subcommittee on Civil and Constitutional Rights, U. S. House of Representatives, Judiciary Committee, Testimony on Department of Justice Enforcement of the Civil Rights of Institutionalized Persons Act, Washington, DC (February 8, 1984).

Subcommittee on the Handicapped, Committee on Labor and Human Resources, U.S. Senate, Testimony on Institutional Care and Services for Retarded Citizens, Washington, DC (November 17, 1983).

Pennsylvania Bar Association, Conference on Legal Advocacy for Disabled Persons, Erie, PA (May 28, 1981).

D.C. Neighborhood Legal Services, Disability Rights Training Conference, Washington, DC (April 2-3, 1981).

TIMOTHY M. COOK

Federal Interagency Advisory Group, Conference on the Supervisor and Disabled Employees, Washington, DC (February 12, 1981).

Legal Services Corporation, Disability Rights Lawyer Training Conference, St. Paul, MN (October 8, 1980).

Vocational Rehabilitation Service Providers Conference, Berkeley, CA (July 14, 1979).

Other Professional Activities

Chair, Disability Rights Section, National Legal Aid and Defenders Association

Officer (Secretary/Historian), Member of the Executive Board, and Member of Litigation Review Committee, The Association for Severely Handicapped Persons

Legal Advisory Committee, Association for Retarded Citizens of the United States

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An Independent
Federal Agency

May 16, 1989

The Honorable Tom Harkin
United States Senate
Washington, DC 20510

Dear Senator Harkin:

On behalf of the National Council on Disability, I want to convey and reemphasize our long-standing and profound support for your efforts and those of other distinguished Members of Congress, who have sincerely committed themselves, as you have, to ensuring, through forthright legislative action, that people with disabilities in the United States will be protected from discrimination on the basis of disability by the full force and measure of the law.

As the Council stated in Toward Independence, its February 1986 report to the Congress and the President, "Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap." The Council continues to believe that this is absolutely and without question the highest priority for action by Congress and the President which exists in the area of disability policy today.

The Council understands that introduction of this important legislation is only the first step in the process of achieving our goal of ensuring equal opportunity and protection against discrimination for 43 million people with disabilities in the United States.

Ultimate passage and successful implementation of this legislation depend on broad-based agreement and support from many sectors. Disability policy is not, nor should it be, a partisan issue or concern. It must be a principal concern of public officials at all levels and of ideologies.

While we are most anxious to see early passage of legislation like that recommended by the Council and introduced by you and Senator Weicker last year, our own experience in developing complex policy recommendations indicates that process plays an important and necessary role in educating interested parties and in building consensus-oriented support.

We know consensus-building and educating can be a relatively painstaking process. However, we believe that the likelihood of adoption and successful implementation of this measure will be enhanced by such a process. The Council urges that any modifications of the Act resulting from such negotiations clarify or enhance, rather than weaken, the strong protections against discrimination to which persons with disabilities are entitled, as recommended by this body on many previous occasions.

As you know, the President has expressed his support in principle for comprehensive protection against discrimination of people with disabilities. We join the President in pledging our support for this Administration to establish, unequivocally, comprehensive equal rights for persons with disabilities. We join the President in pledging our support for this principle. We look forward to working with the Congress and the Administration to establish, unequivocally, comprehensive equal rights for persons with disabilities in our great nation.

Sincerely,

Sandy Parrino

Sandra Swift Parrino
Chairperson

Prepared Statement of Governor Richard F. Celeste

Dr. Martin Luther King lived--and died--with the belief that if the civil rights of even one person are compromised, it effects the rights of all citizens. The simple fact that the Congress of the United States finds it necessary to consider legislation to insure full citizen's rights for 43 million Americans with disabilities is in itself, a recognition that we must remain vigilant to see that the civil rights of all Americans are protected, including those who live with disabilities.

Webster defines the word advocate as "one who gives voice to the cause of others." However, if one applies the philosophy of Dr. King they soon realize that an advocate for the civil rights of people with disabilities really advocates for their own civil rights. Thus, I am honored to have this opportunity to add my voice to that of Senator Tom Harkin, Congressmen Tony Coehlo, Major Owens and the many, many co-sponsors of the Americans with Disabilities Act of 1989 (ADA). I am particularly pleased to be joined in my advocacy efforts by both Senators John Glenn and Howard Metzenbaum of Ohio who are co-sponsors of S.933 as well as several members of the Ohio delegation to the U.S. House of Representatives who have joined as co-sponsors of H.R. 2273.

The Americans with Disabilities Act of 1989 has been called the most important single piece of legislation for people with disabilities since the enactment of Section 504 of the Rehabilitation Act in 1973. In my opinion, it is even more important than that landmark legislation. The legislation being considered goes beyond the limited scope of "504" which only applied to those agencies, programs or institutions which receive federal funds. In ADA, Congress can establish a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities at every level of government and in every facet of American life. ADA is probably the most important piece of civil rights legislation since the passage of the Civil Rights Act of 1964.

My support however is not without some reservations which will be presented later along with some recommendations for strengthening this legislation. However, I realize that the Americans with Disabilities Act of 1989 is an important step forward in our shared desire to insure the maximum independence, the real opportunity for productivity and the full and unimpeded integration of citizens with disabilities in our society. It is my sincere hope that the Congress will act swiftly on this legislation and that the President will soon express and demonstrate his unequiviocal support for this measure.

My reservations regarding ADA stem from the compromises made to develop legislation that was acceptable to a diverse spectrum of interests groups. While compromise is an integral part of the legislative process, we must take care not to dilute the effectiveness of proposed law just to reach compromise. We must also remember that what works in urban areas like our nation's capitol may not be effective in rural areas or small towns.

We must examine the proposed legislation in light of how past efforts to promote the rights of people with disabilities have achieved their goals. It is equally important to take a look into the future when the intent of the act will be implemented by agencies and individuals who may have not shared the passion or lived the experiences that bring this matter before the 101st Congress. We can learn from the past and we can set standards for the future which can project our intentions.

I would like to call attention to three specific areas covered in the legislation that cause me concern.

The first are those sections of Title III of the Act which deal with public transportation. I recognize and accept that economic reality made it necessary to provide for the "phase-in" of accessible public transit services with the purchase of new equipment and/or the construction of new facilities. However, I fear that some transit operators could find ways to prolong the implementation of the Congressional intent that all transit services be accessible to all people at the earliest possible time.

Therefore I would like to suggest that Congress stipulate that all transit providers must submit a detailed plan complete with timelines and measurable goals to the appropriate federal agency within one year of enactment of ADA. Further, I would suggest that such a plan be seen as a binding agreement between the operator and the federal government upon which successful compliance becomes the basis for future federal participation in funding. Thus, once a transit operator submits a plan acceptable to the oversight agency, they could not, without good cause, disregard that plan and remain eligible for federal funds. Likewise, the absence of a plan deems them ineligible for federal funds.

Next, I would like to address the so called "small employer exemption" contained in Title II of the Act. Under this section any employer with fewer than fifteen employees would be exempt from the non-discrimination in employment provisions of ADA. I realize that this was developed following similar exemptions in other civil rights statutes and therefore may be something that we must accept at this time.

However, as you all know, most expert projections indicate that the largest percentage of private sector jobs in the twenty-first century will be with small employers. Perhaps it is time to re-visit the issue of small employer exemptions in all civil rights statutes to be certain that we don't exclude disadvantaged groups, including people with disabilities, from employment in the fastest growing segment of America's job market.

Finally I want to express concern over the implementation and enforcement provisions of the Act. In 1973, Congress passed the Rehabilitation Act which included Section 504, a law which was roundly hailed as the civil rights act for people with disabilities. Sadly, Congress is today--some sixteen years later--addressing the same issue in many ways. Some Federal agencies have not yet fully developed plans to implement and monitor "504" compliance. Indeed, during the last administration, an attempt was made to dismantle what little progress had been made on towards operationalizing "504".

Much of the progress made under "504" has come from case law rather than acceptance of the concept by those officials charged with implementing the will of the Congress. People should not have to file legal actions against their own government in order to obtain the rights promised them by the elected members of the Congress. This method of establishing one's rights is time consuming, expensive and personally degrading. We, as a nation, must do better.

The tools Congress has available to force any administration into complying with its wishes are limited. However, Congress can put the administration--and all future administrations--on notice that one of the measuring sticks applied when dealing with federal agencies will be how they implement the spirit and the intent of ADA. They must know, that agencies will be evaluated on their efforts to insure that there is no discrimination against people with disabilities in any program under their jurisdiction. And yes, state and local governments must also be held to the same standards in their dealings with federal government.

In closing, let me say that the Americans with Disabilities Act of 1989 provides the Congress and the Administration an historic opportunity to clearly articulate the fact that people with disabilities have the same rights as their non-disabled peers. In this effort, government can reinforce the belief that all people, regardless of the presence of a handicapping condition can and should be provided every opportunity to contribute to the lives of their communities.

As Dr. King would say, were he here with us today, as we enhance the opportunities for the integration, the increased independence and economic and personal productivity of people with disabilities, we do the same for all the citizens of our nation.

Thank you.

Regional Transportation District

RTD

350 South Santa Fe Drive
Denver, Colorado 80223-2189
303/628 9000

May 15, 1989

Senator Tom Harkin
Chairman, Senate Subcommittee on the Handicapped
Committee on Labor and Human Resources
Hart Building, Room 113
Washington, DC 20510-6300

Dear Senator Harkin :

In respone to your request, I am pleased to provide the following information about Denver's success in providing wheelchair accessible intercity service with over-the-road coaches.

The Regional Transportation District of Denver, Colorado awarded a contract for intercity transit coaches to Neoplan USA in 1986. The 28 bus order included 17 intercity coaches that were to be handicapped accessible.

During the construction of this coach, the Regional Transportation District discovered a lift for this type of vehicle called the Hubmatic. The Hubmatic lift is presently built in Germany; however, Stewart and Stevenson, a local firm, is in the process of manufacturing this lift for intercity coach use.

The Hubmatic lift eliminates totally the loss of any baggage area. It is a compact lift, very simple in design and easy for the driver to use. We have estimated our loading times at some 55 seconds and our unloading times at some 45 seconds. The entire lift is stored in the passenger compartment of the coach itself. It is an electric over hydraulic system with certain functions for the driver with controls that are very accessible for the driver's use.

This Hubmatic lift is capable of lifting 600 lbs. to a floor height of 52 inches in a matter of seconds. It eliminated only two reclining seats in the coach itself. However, additional design changes to the interior, especially with the seating arrangement, could reduce this loss even further.

The Regional Transportation District of Denver, Colorado operates accessible intercity service with these coaches from Longmont through

Boulder to Denver and then on to the Stapleton Airport, a distance of some 55 miles with 30 minute service. The RTD also operates Park-n-Ride lots along this route and has routes that operate actually up into the Rocky Mountain area as far as the 10,000 foot level. The Regional Transportation District operates in a six county area, supported by taxpayer funds and has an operating system that covers some 2,401 square miles, one the the largest in the country. Eight-five percent of all intercity routes are now accessible using intercity type coaches.

We are estimating the cost of the Hubmatic lift, including installation, at somewhere in the neighborhood of $11,000. This price would be reduced considerably by the manufacture of the lift in the USA, the increased quantity, and the fact that the engineering costs were included in the adaption of the Hubmatic lift to the intercity coach. The Hubmatic lift can be utilized in any intercity operation without any loss of luggage compartment area or any need to increase the operating schedule for the drivers because of its simplistic design.

Since this lift is reliable, the RTD of Denver does not stock any parts and has not had a failure of this lift in the six months it has been in operation for the District. It has been accepted totally by the handicapped community which also had input into the configuration of the lift itself.

Also, this lift could be considered portable if the need would exist. The lift can be removed from a coach in 15 minutes and can be installed in another coach in under 30 minutes if the uppper bracket and lower floor bracket are already in the buses.

We are estimating the cost for installation of this lift on a new MCI coach presently in use by Grayhound Corporation, for example, at some $5000 to $8000. This would include, of course, the floor line to roof section that would be utilized for the extra door, for example. Since RTD Denver paid for all the engineering costs and certification of this lift in the United States, it is difficult to translate those costs of $13,000 for each vehicle into what it would cost if you would install this lift during manufacture.

Please contact me if you need any further information.

Sincerely,

George A. Herman
General Superintendent of Maintenance
Bus Operations

GAH/dlt

Virginia Council for Independent Living

May 16, 1989

The Virginia Council for Independent Living (VCIL) would like to express its outrage at the testimony being presented by the Virginia Association of Public Transit Operators (VAPTO) in opposition to the Americans with Disabilities Act. It is the opinion of disability advocates throughout the state that VAPTO, through its policy of "local option", constitutes the most significant barrier faced by disabled persons in their struggle for independence and integration into the mainstream of public life.

We are especially concerned about the assertion that the disability community in Virginia supports policies of certain transit authorities to purchase inaccessible mainline vehicles. In fact, the VCIL and other disability organizations have vehemently stated their support of a fully accessible mainline system with the provision of para transit services for those who would be unable to access mainline service.

In 1986, three disabled persons in the Tidewater area brought suit against the Tidewater Regional Transit for its failure to provide mainline access and adequate para transit services. In 1988, Handicaps Unlimited of Virginia (HUVA) and the VCIL supported legislation to require that all new vehicles purchased by transit authorities be accessible. VAPTO opposed this legislation.

The VCIL would like to respond in detail to the testimony offered by VAPTO, however, due to timing considerations, this testimony cannot be prepared by this afternoon. Thus, we request the opportunity to enter our comments into the congressional record at a later time.

Thank you for your consideration.

Cordially,

Bonnie O'Day
Bonnie O'Day
Executive Director, Endependence Center of Hampton Roads
Legislative Chair, Virginia Council for Independent Living

Sharon Mistler
Sharon Mistler
Executive Director, Endependence Center of N. Virginia
Member, Virginia Council for Independent Living

Donald Fennell
Donald Fennell
Executive Director, Shennandoah Valley I.L.C.
President, Handicaps Unlimited of Virginia

Appalachian Independence Center, Inc.
230 Charwood Drive
Abingdon, Virginia 24210
(703) 628-2979

Central Virginia Center for Independent Living, Inc.
2900 W. Broad Street
Richmond, Virginia 23230
(804) 353-6503 353-6583 (TDD)

Endependence Center Incorporated
Plume Center West, Suite 224
100 W. Plume Street
Norfolk, Virginia 23510
(804) 625-3555

Endependence Center of Northern Virginia
2111 Wilson Boulevard, Suite 400
Arlington, Virginia 22202
(703) 525-3268

Independence Resource Center
210 W. Main Street, Suite 8-9
Charlottesville, Virginia 22901
(804) 971-9629 (Voice/TDD)

Insight Enterprises, Inc.
11832 Canon Boulevard
Suite F
Newport News, Virginia 23606
(804) 873-0817

Junction Center for Independent Living, Inc.
Route 2, Box 613
Pennington Gap, Virginia 24277
(703) 546-4218

Shenandoah Valley Independent Living Center
21 South Kent Street
Winchester, Virginia 22601
(703) 662-4452 662-4935 (TDD)

3464 Scottview Drive Richmond, Virginia 23225

UNITED
BUS
OWNERS
OF
AMERICA

EXECUTIVE DIRECTOR
Wayne J. Smith

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Eyre Bus Service, Inc.
Glenelg, Maryland

Raynald Dupuis
Arrow Lines, Inc.
East Hartford, Connecticut

Charles Lenzner
Lenzner Coach Lines, Inc.
Sewickley, Pennsylvania

Gordon McKay
Indian Trails, Inc.
Owosso, Michigan

Robert L. Quick
Quick-Livick, Inc.
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John Silvanie
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Hiawatha Coaches
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Trombly Motor Coach Service, Inc.
North Andover, Massachusetts

June 1, 1989

Honorable Tom Harkin
Committee on Labor and Human Resources
SH-316
United States Senate
Washington, D.C. 20510

Dear Senator Harkin:

On behalf of the more than 1,000 members of the United Bus Owners of America (UBOA), I am today forwarding to you a personal copy of this association's comments, criticisms and suggested revisions of S. 933, the "Americans with Disabilities Act." I have, under separate cover, requested that these comments be made part of the official record of proceedings on this legislation.

Our members, the Nation's privately-owned and operated bus lines, range in size from the 4,000-vehicle fleet of Greyhound and Trailways to single-vehicle charter operators across the Nation. In addition, UBOA represents, as associate members, the vast majority of coachbuilders, bus equipment makers and dozens of service agencies which support the private bus business in America.

We believe that approval of this bill in its current form -- rather than increase access to intercity travel by handicapped persons -- will force a severe reduction in these services and, as such, could result in a near-total loss of intercity service to all Americans. Though we join with so many others in applauding the concept of this bill, we urge that each member of the Committee carefully address the concerns noted in our comments prior to passage.

I would be pleased to personally discuss this matter with you at any time you consider it appropriate to do so. Please contact me at the above-listed number.

Sincerely,

Wayne J. Smith

Wayne J. Smith
Executive Director

WJS/s
encl: comments/testimony

Tel. (202) 484-5623 • Suite 800 • 1275 K Street, N.W., Washington, D.C. 20005-4006

COMMENTS: S.933

Before the U.S. Senate Committee
on Labor and Education

May 1989

by
Wayne J. Smith
Executive Director
United Bus Owners of America

Suite 800
1275 K Street NW
Washington, D.C. 20005

202-484-5623

TO: Senator Edward M. Kennedy, Chairman
U.S. Senate Committee on Labor and Human Resources
From: Wayne J. Smith, Executive Director
United Bus Owners of America
Re: S. 933, Americans with Disabilities Act of 1989 May 24, 1989

Mr. Chairman, members of the Committee, as Executive Director of the United Bus Owners of America (UBOA) and on behalf of UBOA's more than 1,000 members, I urge that significant changes be made in S. 933, the Americans with Disabilities Act, before this Committee approves the legislation for full Senate consideration.

The United Bus Owners of America is an association of private bus owners and operators ranging in size from the 4,000-bus Greyhound to single-vehicle charter operators. We also represent, as associate members, the commercial businesses which serve the needs of this industry. Our associates include coachbuilders, equipment and accessory makers, and representatives of a wide variety of service industries.

In unison, we applaud the goal and concept of this legislation: the elimination of discrimination against our American neighbors with mental or physical handicaps. And, in unison, we speak out against the single-minded legislative myopia which drives this bill to demand -- in the case of private intercity transportation -- that the forest be clear-cut so we may have a better view of the trees.

In the Committee's enthusiasm to "do right," we believe that the original version of S. 933 was crafted with serious flaws. These desperately need to be corrected prior to its becoming law. They threaten the very existence of the American private bus industry and, if they are not addressed, the passage of a bill designed to assist the handicapped will instead result in the near-total loss of intercity bus service to the handicapped and to every American.

At stake, Mr. Chairman, is the question of whether this Committee is ready to jeopardize the most widespread, most affordable means of transportation now available to the American citizen to establish a worthy but limited goal of "full accessibility" for a small segment of this Nation's population.

Specifically at issue are the requirements in S. 933 that all new buses sold in the United States be made *"readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."*[1]

Mr. Chairman, members of the Committee, our operators today offer the most accessible, most available, most affordable means of public transportation in America. And, unlike our competitors, we do so virtually without assistance from this or any government. We survive because our members are good businessmen and women who are willing to accept a very narrow margin of profit to continue in business as independent, tax-paying enterprises.

Despite the narrow margin of profit and the near-total lack of governmental funding, the estimated 46-million handicapped persons addressed in the preamble of this legislation already find that our owners and operators are among the most accommodating businesses in the Nation. With very few exceptions, private bus owners are prepared to transport handicapped persons in the same manner and level of service afforded fully-capable passengers. In many cases, handicapped persons are offered discount or totally free passage; in others, attendants travel at reduced fares or completely cost-free. Guide dogs have long been welcomed aboard our vehicles. Wheelchair-using passengers who are brought aboard by attendants are easily accommodated.

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[1] S. 933, Title III, §303(b); Title IV, §402(b)(7)(B)

It is only the occasional wheelchair-bound passenger, who may even remotely perceive that he or she is denied "ready accessibility" to the services offered by UBOA members. It is also this final category of potential rider whom, we believe, is being excessively accommodated by this bill's most serious degree of "legislative overkill," the apparent requirement that every new or re-manufactured bus sold in this country be equipped as "fully wheelchair accessible."

Allow me to address four important aspects of the bill's intended requirements: **cost, safety, practicality** and finally, **alternatives.**

First, however, it's critical that the goal of this Committee be carefully defined. Legislative language and perceived intent have a great deal to do with the way any legislation is enforced. If the transcript of these hearings is to be used as a guide for future enforcement, our perception of the intent is that all persons must have equal opportunity to board, move about within and use the available facilities of every passenger vehicle on the road. The Committee has demonstrated that it is unwilling to tolerate the concept of "separate but equal" facilities, as well as requirements for advanced scheduling or any similar encumbrance for the wheelchair-bound passenger. The "next bus out" must be as ready to accommodate the handicapped as any in the fleet.

If that is the case, every motor coach used by UBOA members must, at a minimum, be wheelchair lift equipped; it must have aisles and restrooms which are wide enough to accept wheelchairs; it must allow enough seating space to secure a wheelchair.

Because the Committee seemingly considers it the least important aspect of all four criteria, I'd like first to address the question of the cost of these changes to the private bus industry in America. For the moment, I'll limit my comments to equipment purchase costs.

The average private line motor coach sold in the United States today is $200,000. It carries 47 passengers; it is 40-feet long and 102" wide. It's aisles are 14" wide and the floor of the passenger deck is approximately four to five feet off the ground, riding atop a luggage and storage compartment with a capacity of some 330 cubic feet. It's useable life, depending on the service requirements, is 8 to 12 years.

The addition of a wheelchair lift and coach design changes to aisle, restroom and seating, will cost each new coach buyer $35-$50,000 at the outset of this bill's life. Lifts, of course, need to reach the lofty second deck safely and to be fitted into a coach which is far more complex engineered than the everyday transit bus. While cost would be expected to drop over a period of time, reflecting the economies of volume as the luxury coach business adopts these standards, the lift will never be as inexpensive as its transit counterpart. By the same token, the mechanical reliability of lifts will, hopefully, improve dramatically in the future, reflecting technological advances which naturally follow a high-demand product.

Certainly, it can be argued that design changes in the bus will become manufacturer standards and, as a result, will represent virtually no increase in cost beyond the actual supplementary hardware and installation. The same might be considered for the cost of video equipment which would serve the hearing-impaired and braille or audio equipment to serve the unsighted.

Of course, it is within the right of this committee to demand that the equipment be added -- regardless of cost -- to serve the traveling public. UBOA does not question the Committee's right to make such a decision, only its wisdom in doing so.

I'll come back to cost, but for now let's assume that every bus buyer in the Nation is prepared to pay the additional 25-percent front-end cost for the equipment.

Let's move on to the question of safety.

Lifting a passenger 18-inches from ground to the deck of a transit bus or a step-van is a comparatively risk-free activity. Equipment need not be designed, nor employees highly-trained to affect the loading of a passenger. Such is not the case with a four to five foot lift onto the second deck of a luxury coach. No doubt, insurance liability costs will mirror the increased risk from injury in falls caused by potential equipment failure or poorly-trained staff. But if we were to assume the optimum -- 100-percent equipment reliability and 100-percent reliable employees -- what's to be said about safety on once the passenger is on board.

Today, the U.S. Department of Transportation hazardous cargo regulations prohibit the stowing of battery-equipped wheelchairs in bus luggage compartments. Will the DOT look more favorably to the transport of these explosive-potential batteries in the passenger compartment? Or should DOT simply drop it's prohibition? Technology is, at the moment, targeted on creation of a safe battery which may be stowed and transported, but if this legislation is approved quickly, will only non-electric wheelchairs be permitted? Will the wheelchair occupant be required to bring along his or her own seat belt? Will there be a standard implemented to see that all chairs are secured properly during transport?

UBOA interprets this legislation as prohibiting any rules for wheelchair bound passengers which it would not apply to fully-mobile passengers. As such, wheelchairs must be allowed to traverse aisles during a journey, certainly at least to the restroom. We suggest, however, that an unsecured wheelchair -- not to mention its occupant -- would become a lethal missile in an emergency situation. Even if it remained on the deck, it represents a barricade to paths of escape, a violation of federal safety regulations.

I remind the Committee that the tragic crash of an out-of-service school bus being operated by a church cost 27 lives in Carrollton, Kentucky, just last year. In large part, those who died were not victims of the trauma of the crash, they died because they could not escape the burning bus. Federal investigators found that items as insignificant as picnic baskets and coolers in the aisle cost the lives of some of those who might otherwise have escaped. A picnic basket is far less impeding than a wheelchair.

If we assume that there is a way to ensue that the wheelchair passenger is properly secured at the time of a vehicular accident, we cannot assume that the paralyzed occupant is capable of negotiating his or her way to a proper exit. Elevators in buildings -- where all other elements are stable -- all carry warnings that they are not to be used in times of emergency conditions. Will we expect a higher standard of mobile elevators? Or will each bus be designed with some form of ejection device for the occupant of a pre-designated seat or wheelchair pad? If so, how many devices or directions need be considered?

From a safety and emergency escape standpoint, the on-board wheelchair can be a nightmare within a nightmare. This Committee must share the responsibility, with buyers and with manufacturers, of deciding on a reasonable and acceptable method and level of safety for the wheelchair-bound passenger.

From a third perspective, I urge this Committee to look at the practicality of its demand that 100-percent of the American fleets of intercity and privately-owned buses be equipped to accommodate three-tenths of one percent of the population.[2] In a survey of UBOA members, annual requests for lift-equipped buses averaged two. One member in the San Francisco area noted that, over 11 years of business, he had yet to receive one request. In virtually every instance, operators noted that alternative sources of transportation for the wheelchair-bound passenger are abundantly available through existing community services. Virtually all responses indicated that this legislation -- if approved as is -- would force them to close the door to their business.

Which brings me back to a point which I already understand this Committee does not want to discuss: the cost of this measure, in realistic, boilerplate terms. Or, maybe I should say it brings me back to a discussion of "value: cost versus returns."

Gentlemen, compassion is a wonderful thing. Without compassion for one's fellow human beings, without altruistic motivation, America could not ever have become the power it is today. Without charity and a belief in the "rightness" of what we are doing, little would ever be done. And, while I applaud the "rightness" of the goal of the ADA, I suggest that the brilliance of compassion has handicapped this legislation.

What this Committee decides to do with federal money is, technically, its business, though it is our members who pay the taxes which pay for your decisions. If it is the desire of this Committee to require its federally-support transit fleets to be fully lift-equipped, and if you're ready to pay the cost of that, we urge that you follow your conscience. You and your constituents will, ultimately, decide whether or not your vote to disburse billions of tax dollars was a sound decision. I suggest that the soundness of federal policy might be questionable when -- in the same year -- federal sources would require spending $50,000 to accommodate one potential passenger in 300, though it's unwilling to spend a few bucks to strap a ten-trip per week school child into safety with seat belts.

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[2] U.S. Department of Commerce, Bureau of the Census, U.S. population in 1980: 226,000,000+; wheelchair-using population, approximately 720,000 persons.

But what you do with our money and our business is another matter. Earlier, I skipped past initial vehicle modifications so that we could look at the many other aspects of this bill's requirements. Now I want to return to it.

If we still assume that the UBOA member who buys a new bus can, indeed, afford to spend an extra 25 to 30-percent for the vehicle, it's highly doubtful that he or she will ever be able to afford o keep that bus on the road.

From the current 47-passenger configuration, lift installation will cost at least four seats. Now we're down to 43. Securing the wheelchair in place -- assuming only one wheelchair per trip -- and expanding the size and access of the restroom, will cost another four seats at a minimum. Now we're down to 39. Aisle widening will force reconfiguration of the current four-across seating to three across; Mark out another 9 to 11 seats. Now we're down to 30 passengers, at best, in a business where 47-seats have served as the norm. The same is true of the capacity in the luggage compartment where valuable package express services help underwrite the cost to passengers.

Remember that we're prohibited from expanding the size of the bus; state and federal size restrictions determine the maximum exterior dimensions of that vehicle. Unless the Federal government widens roads or mandates smaller people, we're pretty well stuck with what we've got.

This bill, then, costs a minimum of a 36-percent loss of passenger and package carrying capacity, on top of the 25-30 percent increased cost of the vehicle. No carrier -- from

UBOA's largest member, Greyhound/Trailways, to the smallest, will be able to absorb that cost without passing it directly on to the customer.

And who is the passenger who'll be expected to pay this cost?

In large part, the bus passenger today is: a) someone who cannot or chooses not to afford a personal automobile; b) senior citizens on fixed incomes; c) low-income families; d) students; e) virtually anyone who wishes to take public transportation to or from an American community which is not served by an airline or rail terminus. There are, by the way, plenty of those latter communities. Regularly scheduled air carriers reach fewer than 500 communities; AMTRAK about the same. Regularly scheduled bus service today touches about 10,000 communities.

These are not customers with a choice of transportation modes. These are not customers with deep pockets who travel by bus so they can spend more at the Atlantic City gaming tables. These are people with only one avenue to the foundational American promise of affordable and available travel.

Today's bus operator lives on a very narrow ledge, whittled back even farther by the grossly unbalanced federal transportation subsidy policies of the last generation. Since 1965, the pre-tax net income of the intercity bus industry has fallen to one-eighth of its level at that time.[3] That drop seems to correspond near identically with the spending of some $90.5 billion[4] in federal assistance since 1960. During that time, while Congress subsidized each AMTRAK passenger with $33.45 per ticket, intercity bus passengers received eight-cents each.[5]

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[3] "Federal Subsidies for Passenger Transportation, 1960-1988: Winners, Losers, and Implications for the Future," Robert R. Nathan Associates, Inc., May 1989.

[4] ibid.

The intercity bus is a low-margin, peak-period business. The charter bus business is little different. Customers turn to the bus to save money; it's a fact of life. When that single and slim marketing edge is lost, so too is any reason to stay in that business.

Leaving us at the bottom line: most of our members will be forced out of this business. The added cost of vehicles will force many out right away. The added cost of operating will force out many more. Those who are left, if any, will be left to charge airline prices for intercity travel – prices which thousands of Americans already find intolerable.

The decreasing passenger levels will, of course, contribute to a downward spiral of service and an upward and corresponding spiral in prices.

Should this legislation pass as it is now written, UBOA predicts that a decade from today the private bus operator will be as scarce as the private rail passenger line in this Nation.

Congress will, indeed, have torn down the discriminatory barriers between the handicapped and able-bodied traveler in America: neither will be able to afford or to find intercity bus service. Able-bodied and handicapped will, together with elderly, low-income and every rural resident without private transportation, become a Nation of shut-ins.

To the age-old question, "How ya' gonna' keep 'em down on the farm?" this Committee seems to have found the answer.

A decade from today or before, Congress will be faced with a single alternative: the creation of "AMBUS," a nationalized, fully-subsidized intercity bus line operating with all of the efficiencies and innovation of the Nation's existing transit systems. The same basic subsidies will be applied to create an intercity clone to the transit system which, in his final budget to this Congress, President Reagan said, "finance high wages and low labor productivity. The subsidies encourage waste, distort local decision making and perpetuate public monopolies that discourage competition. Very little of the subsidy benefits the transit rider."[4]

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[5] ibid

What are the alternatives?

UBOA agrees that more can be done in our industry to accommodate the handicapped passenger. Uniform standards and policies toward the handicapped rider might become voluntary criteria so that the handicapped know what to expect when they are in need of intercity transportation. More systems might be encouraged to invest -- with public assistance -- in lift-equipped vehicles. More cooperative efforts can be encouraged between public and private operators; after all, virtually all lift-devices today are publicly-underwritten or -owned. Direct federal assistance -- both capital and operating assistance -- can be offered to private operators to encourage lift installations. Even requirements for proportional fleet purchases would make more sense than this shotgun approach.

In the long run, however, UBOA believes that the ADA demands far, far too much from bus owners and operators in response to the statistical and demonstrated need for handicapped intercity transportation. Equipping every vehicle to prepare for the call which may never come is squandering precious resources which could certainly be better spent. And it doesn't matter whether those are private or public resources -- neither of us can afford it.

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[4] Fiscal Year 1990 Budget of the United States, Major Policy Initiatives, President Ronald W. Reagan, 1989.

UBOA encourages the passage of those sections of the ADA which offer the handicapped a legal recourse to willful, obviously intentional and continuing discriminatory practices by American business, though we believe that far more opportunity for negotiated settlement should be added to this bill.

To summarize, Mr. Chairman, this bill's sections calling for modifications in all new buses sold in America will, at best, blanket this Nation with equipment which will never be used, for which too many people will pay too much. At worst, the private intercity and charter bus operator will disappear entirely, leaving the American traveler entirely in the hands of air and rail carriers which are too costly and reach too few communities. Or, it will force the nationalization of an entire industry or the abandonment of the American principle of a fully mobile population.

UBOA urges a more realistic and practical assessment of the problem be made, and a more solution be sought reasonable and pragmatic solution sought. If significant changes are not made, UBOA urges that this bill be defeated.

Thank you for this opportunity to address our concerns.

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NEWS RELEASE

Tom Harkin *OF IOWA*

UNITED STATES SENATOR

COMMITTEE ON LABOR AND HUMAN RESOURCES
HEARING ON S. 933
THE AMERICANS WITH DISABILITIES ACT OF 1989
JUNE 22, 1989

OPENING STATEMENT OF TOM HARKIN

The Americans with Disabilities Act is the most important legislation affecting the lives of people with disabilities ever considered by the Congress. We now have 43 co-sponsors of this historic legislation from both sides of the aisle. The ADA has now been endorsed by over 140 national organizations, including most of the major religious organizations.

After three days of hearings this year and one hearing last year, several conclusions have emerged.

First, discrimination against people with disabilities remains pervasive in our society.

Second, people with disabilities are entitled to lead independent and productive lives, to make choices for themselves, and be integrated and mainstreamed into society. People with disabilities must be judged on the basis of their abilities and not on the basis of misperceptions, ignorance or irrational fears. These are inalienable civil rights.

Third, people with disabilities are entitled to meaningful access to all aspects of American society, which includes access not limited to places of employment, restaurants, and hotels but also includes, among other establishments, doctors offices, cleaners and shopping malls.

Fourth, in order to ensure independence, productivity, and integration into the community for people with disabilities, it is necessary to adopt comprehensive civil rights legislation. For example, transportation is the linchpin that ensures access to jobs, access to a social life, ability to go to restaurants and participate in community activities.

Fifth, it is not economically feasible to remove all architectural, communication, and transportation barriers in existing facilities but we must improve access in such existing facilities. However, we can and we must insist on full accessibility in all new facilities.

Sixth, a right without a meaningful remedy is like a bell without a clapper, hollow and empty.

Seventh, the Americans with Disabilities Act balances the rights of people with disabilities with the legitimate concerns of the business community. The ADA does not create undue burdens on small businesses.

Eighth, the Americans with Disabilities Act is not only the right thing to do for people with disabilities but it is also the right way to help strengthen our economy and enhance our international competitiveness. The ADA will save the government and society billions of dollars by getting people off the dependency/social welfare rolls and into jobs, into restaurants, into shopping centers, and into community activities.

Two days before Mr. Bush's inauguration, he stated that "I said during the campaign that disabled people had been excluded for far too long from the mainstream of American life...One step that I've discussed will be action on the Americans With Disabilities Act in order, in simple fairness, to provide the disabled with the same rights afforded others, afforded other minorities."

I look forward to hearing the testimony of the Attorney General on behalf of President Bush and from my friend and colleague Lowell Weicker, the chief sponsor of the ADA of 1988.

STATEMENT BY SENATOR DAVE DURENBERGER
AMERICANS WITH DISABILITIES ACT, S. 933
JUNE 22, 1989

Mr. Chairman, I want to thank you for holding this additional hearing in order to allow the Administration the opportunity to testify on the Americans with Disabilities Act, S. 933.

On several occasions over the past year, we have heard President Bush pledge his support of comprehensive civil rights legislation for persons with disabilities. And I believe he is truly sincere in his promise.

I don't think anyone disputes the necessity of expanding the rights of persons with disabilities. It is a disgrace that the disabled are the only class of people who still do not have any recourse or protections from civil rights violations. This means that a person with a disability can go into a restaurant and be turned away simply on the basis of disability, and have no legal recourse. It also means that that same person could walk into the county store down the street seeking employment and be denied simply on the basis of disability. This is wrong, Mr. Chairman. Where there may be concerns about this legislation is in how we get to the end goal of ensuring the civil liberties of persons with disabilities.

Mr. Chairman, I spent a considerable amount of time during the last recess back in my state talking about the ADA and listening to individuals concerns and suggestions. While there were some concerns about the implementation of some sections of the current bill, what I found was universal acceptance of goal of the ADA. What I also found was numerous examples of programs that are working, including restaurants that were accessible, and businesses that were employing persons with disabilities. These programs were working without the undue burden that some witnesses have testifies to the fact before this committee. These were exceptional companies no doubt, including IBM, Dayton-Hudson, and several prominent Minnesota restaurants. But I think these programs are important to point out as examples to what can be achieved rather than always focusing on what cannot be achieved. I found that the key element to the success of these programs has been the partnerships created between the public sector, private sector and the disability community to educate individuals and businesses about the problem, and to make them aware of options and solutions to problems of accessibility.

The point I think I would like to make is that while I do recognize that there are legitimate concerns that still need to be addressed in the context of this bill -- and I welcome the opportunity to work with the Administration, Senator Hatch, Senator Harkin and others to resolve these differences-- that I think there are many concerns exist due to a lack of understanding and a fear of the unknown, and I don't believe the challenges before us are not insurmountable.

I am aware of President Bush's commitment to this issue and I believe that this is an issue that is truly bi-partisan in nature. So I hope that we all can come to an agreement on this issue and begin to work together so that we can present the President with legislation this year. This will mean long hours and compromise from all sides, and I hope, Mr. Chairman, that this bill will receive the time and consideration it so rightly deserves.

KEY COMMENTS AND FINDINGS IN MINNESOTA ADA HEARINGS

OVERALL:

We heard various examples of programs that were working, including resturants that were accessible, and businesses that were employing persons with disabilities. **The key element to the success of these programs has been the involvement through partnerships between the public and private sector and the disability community to help educate individuals and businesses about the problem, and to make them aware of options and solutions to problems of accessibility.**

TRANSPORTATION:

- We do have systems in place that can help facilitate better access, but there is a need for better coordination of federal transit funds, and a need for increased flexibility in federal mandates.
- There is a need for greater flexibility in the coordination in social service programs.

COMMUNICATION:

- We must make sure that we do not exclude non-profits from participating in the program. (language of the bill allows this).
- There is a question about who assumes ultimate responsibility in the interstate and intrastate relay system.
- There is a need to increase funding for technology through partnerships.

EMPLOYMENT:

- There is a need for better coordination with different agencies to gather information on how to match jobs with people -- possibly through a new central agency to help with the implementation of the Act and to act as a clearinghouse of information.
- A lot can be accomplished simply if people are aware, are educated about options available to them. ie. IBM, Daytons.

PUBLIC ACCOMODATIONS:

- Involvement by the community can help reduce the burdens of the Act. Awareness & Education are the key.

Statement by Senator Howard M. Metzenbaum
on the Americans with Disabilities Act, S933
June 22, 1989

I'm very proud to be cosponsor of the Americans with Disabilities Act of 1989. I commend the distinguished Senator from Iowa, my good friend Mr. Harkin.

In earlier hearings we heard moving testimony from highly qualified people who could not get jobs because employers saw only their disability -- what they could not do -- and not what they could do.

We heard people with disabilities recount heart-rending and shocking stories of being kicked out of restaurants and turned away from movie theaters simply because they are disabled.

If a person was told to leave a restaurant or movie theater because they were black. Or Jewish. Or a woman. We'd find it unacceptable. Morally repugnant. Outrageous. And against the law.

Today we are here to say that it's just as unacceptable. Morally repugnant and outrageous to discriminate against a person because he or she is disabled. And with the Americans with Disabilities Act, we will at long last make it against the law.

We also heard about the important issue of transportation -- or the lack of it -- for disabled Americans. All the good intentions in the world are for naught if a disabled person cannot enjoy the freedom and mobility that many of us take for granted: the ability to get to and from work. To get to doctors' appointments. To attend theater and art shows. To socialize with friends at a restaurant or home across town. Or to get from one city to another the way so many of us routinely do.

Transportation is especially important if disabled Americans are to have full opportunity in the workplace. Almost 70% of disabled people who were unemployed said transportation was the main reason. We are shortchanging ourselves if we can't count disabled Americans as part of our economy.

Many decades ago Rosa Parks said no to the idea that blacks must sit on the back of the bus.

As it stands, many disabled people cannot even get on the bus. And that's not right.

The Americans with disabilities Act would go a long way toward improving that by requiring that new buses be accessible to the disabled.

I know some people have criticized this provision as being too broad. But I'm concerned that may not be going far enough. In some Ohio communities, it may be 15 years before they get a new bus to be made accessible. 15 years -- into the next century -- before some of these citizens will have access to transportation.

In the name of compromise -- of getting this important legislation passed -- I understand that all sides have given in a little. And I commend that effort -- the effort of Sen. Harkin and his staff. Because importantly, the Americans with Disabilities Act of 1989 retains its essence.

The ADA is a good bill. A much needed bill. It has real teeth and enforcement powers. And it will go a long way toward accomplishing our shared goal of making sure Americans with Disabilities have a fair share in our great country.

I appreciate the comments of Attorney General Thornburgh and Senator Lowell Weicker.

PVA

PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

June 22, 1989

The Honorable Tom Harkin
Chairman, Subcommittee on
the Handicapped
United States Senate
Washington, D.C. 20510

Dear Senator Harkin,

I understand that today Attorney General Richard Thornburgh will offer testimony regarding S. 933, the Americans with Disabilities Act. I am encouraged by the fact that the Administration was able to meet the agreed upon time frame to present their views on this most important legislation. It is my hope that Congress can now move forward in a bipartisan fashion to swiftly enact this bill into law.

There is, however, one point that I must address regarding Mr. Thornburgh's testimony. It is my understanding that the Administration supports the principle of nondiscrimination on the basis of handicap especially as it relates to transportation. However, they request an exception for areas of the country where inclement weather such as ice or snow could make the use of a bus with a wheelchair lift more difficult than in other areas of the country without these weather conditions.

PVA disagrees strongly with this exemption. Being a native of Buffalo, New York, I can speak with some authority on what works in areas of inclement weather. In Buffalo, according to the 1987 APTA fleet survey, 196 of the 427 fixed route buses were equipped with wheelchair lifts. Let me tell you that it does snow in Buffalo. In the winter of 1985, just before my wife and I moved to Washington, D.C., we had a storm that dumped over three feet of snow within three days. The average snowfall is over 100 inches a year and in 1978 we had record snowfalls of over 200 inches.

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However, people still use the transit system when the weather is bad. Moreover, I don't know of many areas of the country where, on a consistent basis, the weather is so inclement that people with disabilities could not usually gain access to the bus.

It is also not true any longer that lifts are unable to work in icy or snowy conditions. What may have been true with the first generation of lifts in the 1970's is not true with the current generation of wheelchair lifts. Many cities such as Buffalo have had successful programs with fixed route buses even though they have inclement weather. Cities such as Lansing, Michigan; Minneapolis, Minnesota; Great Falls, Montana; Eugene, Oregon; Johnstown, Pennsylvania; Sioux Falls, South Dakota; Osh Kosh, Wisconsin; Seattle, Washington; and Denver, Colorado; have successful fixed route accessible transit despite cold or rainy climates. Even in Fairbanks, Alaska, eight out of 17 of their fixed route buses have wheelchair lifts.

In fact, this Committee heard testimony from Harold Jenkins, Director of the Johnstown, Pennsylvania, Transit Authority, which has a commitment to 100% accessibility.

In 1985, the Urban Mass Transit Administration funded a very successful lift research project which examined ways to design and maintain lifts in areas with inclement weather. Since then, many of the recommendations of the study have been incorporated into new designs of wheelchair lifts.

Since the ADA only requires that new buses be accessible, the problems which occurred in the past should not be a great concern. I believe that it would be counter-productive and contrary to the intent of this legislation to exempt cities from the new purchase requirement simply because it snows or is cold some of the time.

Only providing paratransit services cannot meet the needs of people with disabilities in today's society. Cities should be encouraged to design innovative ways to ensure that disabled people can use the accessible transportation system. For example, there is an innovative program in Michigan that allows a disabled person to create their own accessible bus stop merely by holding out an orange glove to indicate that they want to be picked up by the bus. This allows disabled individuals to access the bus system even though they might not otherwise be able to get to the bus stop. Other such programs should be encouraged.

I hope that this information is helpful and thank you for your strong leadership on the Americans with Disabilities Act.

Sincerely,

David M. Capozzi

David M. Capozzi
National Advocacy Director

Prepared Statement of Richard Thornburgh

Mr. Chairman, distinguished members of the Committee, it is a great pleasure for me to be able to present to you the Administration's views on the proposed Americans With Disabilities Act. Twenty-five years ago to this day, Congress and the President were putting the finishing touches on the Civil Rights Act of 1964, the most important civil rights legislation ever passed. It is exciting for me to be a part of the process which, this year, will pass legislation that will extend the Nation's civil rights guarantees to the disability community. Persons with disabilities have already made enormous contributions to American society, and can and will contribute even more as legislation goes forward in this Congress to improve their even greater entry into the mainstream.

It is estimated that there are over 36 million Americans with disabilities. President Bush has consistently supported efforts to bring these Americans into the "mainstream" of American society. As Vice President, he stated that we must develop programs and policies that promote independence, freedom of choice, and productive involvement in the social and economic mainstream. This means access to education, jobs, public accommodations, and public transportation - in other words, full participation in and access to all aspects of society. This year, in his remarks to the Joint Session of Congress, the President reiterated this commitment. We at the Department of Justice wholeheartedly share these goals and commit ourselves, along with the President and the rest of the Administration, to a bipartisan effort to enact comprehensive legislation attacking discrimination in employment, public services, transportation, public accommodations, and telecommunications.

Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. Fifteen years have gone by since the Rehabilitation Act was passed. In that time the doors of educational opportunity have been opened to persons with disabilities. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life. The unreasonable and, in most cases, unthinking failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, and telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit from the richness of American society. The continued maintenance of these barriers imposes staggering economic and social costs and inhibits our sincere and substantial Federal commitment to the education, rehabilitation, and employment of persons with disabilities. The elimination of these barriers will enable society to benefit from the skills and talents of persons with disabilities and will enable persons with disabilities to lead more productive lives.

Efforts to develop comprehensive legislation to ensure equal opportunity for disabled persons should, of course, also be mindful of other principles as well. First, any new legislation should take into consideration the existing fabric of Federal laws prohibiting discrimination on the basis of handicap. During the past two decades, Congress has enacted a series of statutes focusing on a wide range of problems and providing an intricate web of enforcement procedures. The courts and Federal agencies have also been active in interpreting these laws, defining the meaning of nondiscrimination in the context of disability. Any new legislation should be coordinated with this body of law in order to avoid inadvertent conflicts, confusion, the inefficient use of enforcement resources, and unnecessary litigation.

New legislation prohibiting discrimination on the basis of disability should use as its model the panoply of civil rights laws prohibiting discrimination on the basis of race, color, national origin, and sex. We must end the anomaly of widely protecting women and minorities from discrimination while failing to provide parallel protection for people with disabilities.

New legislation should also be designed to keep the development of intrusive Federal regulation to a minimum. It is the Administration's goal to regulate the private sector only in those situations where it is necessary and only to the extent called for by the problem at hand. Concerns for the economic efficiency of America's businesses, especially its small entrepreneurs, and for competitiveness in the world economy must be given due weight. Legislation which unduly burdens American businessmen and women is ultimately in no one's interest.

Federal action in this area should likewise recognize that States can act (and most have already acted) to protect the rights of persons with disabilities in ways tailored to each State's particular circumstances.

Finally, the issue of costs, both the fiscal cost of lost income tax revenues and increased transfer payments when disabled persons are not accommodated and the cost of accommodating persons with disabilities, must be considered. Careful consideration must be given to whether the line on costs has been drawn in the proper place, and we will need to work together in the weeks ahead on this.

The cost issue is made more difficult because it is virtually impossible to put a price tag on the accommodations required by any bill in this area. For example, while widening an existing doorway will cost $300 to $600, no one can estimate with any degree of reliability how many doorways will need to be widened. Making accurate cost predictions is also hampered by ambiguity in the standards enunciated in S. 933.

Similarly, we must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country. As with the area of costs, we have found it difficult to quantify the exact economic benefits of legislation in fiscal terms. Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increased earnings, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues.

With these principles as a guide, I would like to address the "Americans with Disabilities Act of 1989." This Committee is to be commended for its efforts in drafting S. 933. One of its most impressive strengths is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections. In some areas, there are overlapping pieces of fabric, duplication that has resulted in confusion and counterproductive enforcement efforts. The Administration supports the legislative effort to enact a bill that is at one time cohesive, coordinated, and comprehensive.

I am pleased that S. 933 includes provisions pertaining to job discrimination. Perhaps the most glaring omission in the landscape of disability rights laws is that there is nothing in the Federal law that prohibits discrimination in employment in the private sector against those with disabilities. While persons who work for the Federal Government, who work in federally assisted programs, or who work for certain Federal contractors are protected from discrimination on the basis of handicap, most other workers are not. Each year in this country, over 150,000 young men and women with disabilities complete their education under the Education of the Handicapped Act, some receiving high school diplomas, some receiving certificates of completion. This education law has been one of our modern success stories in the disability area. But if our investment in the education of these students is to bear fruit, we must ensure that they face an employment arena similarly free of discrimination on the basis of handicap.

President Bush endorses your concept of paralleling in the disability area Title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination on the basis of race, color, national origin, sex and religion. Furthermore, it is the Administration's view that such legislation should use the standard provided by section 504 of the Rehabilitation Act of 1973 -- the concept that nondiscrimination includes the requirement that an employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons as long as making the accommodation would not result in an undue hardship on the operations of the employer.

Such a law would be a major step forward for persons with disabilities. We must be mindful, however, of the cost burdens that this law more than other civil rights laws will place on businesses. It is our goal here to seek a balance: to bring persons with disabilities into the mainstream of American economic life and reduce the cost to society of exclusion while, at the same time, keeping the American economic system strong and viable. We are concerned with the impact of S. 933 on small businesses. Because small businesses have limited financial resources, they do not have the advantage of spreading the costs of accommodations over a large payroll. Further, their small workforce gives them limited flexibility in restructuring jobs, a frequently used method of making reasonable accommodations. For these reasons, the Administration would like to join the dialogue with this Committee on the appropriate extent of coverage for smaller employers.

Of course, any legislation must be consistent with Federal drug-free workplace initiatives. I need not remind this Committee of the scourge of illegal drug use in this country and its frightening impact on daily American life. We believe that this bill should make clear that substance abusers should not be included within the protections of this civil rights statute. The bill should also be fully consistent with this Administration's commitment to the eradication of substance abuse in the workplace and elsewhere.

The inclusion of public accommodations in the "Americans with Disabilities Act" is a Federal recognition of their importance in American life. Just as Title II of the Civil Rights Act of 1964 opened up restaurants and theaters to Black Americans, S. 933 promises to persons with disabilities the ability to enjoy full participation in our American way of life. The Administration endorses the prohibition of discrimination on the basis of disability in public accommodations. Recent studies show that persons with disabilities are too often discouraged from attending concerts, going to restaurants, and attending movies. We recognize that requiring public accommodations to make themselves accessible to persons with mobility impairments and to provide auxiliary aids to those with visual and hearing impairments could result in significant costs. We would like to work with this Committee to develop provisions that will ameliorate the cost burden. Similarly, we need to work together to define the parameters of coverage in this area. We think that modifications to S. 933 should address our concerns regarding the scope of public accommodations.

We also seek a bill in this area that will provide clear guidance so that unnecessary and costly litigation can be avoided. Great care then should be taken in crafting a standard for what constitutes discrimination. It may be preferable to use terms and concepts from section 504, a law that now has a 16-year history, rather than developing new terms and standards. Finally, any new legislative initiative should avoid potential confrontation with the First Amendment to the Constitution that might arise with the coverage of religious institutions.

The provision of accessible transportation for persons with disabilities has been one of the most complex issues faced by Congress and the Executive Branch. Four statutes[1] and a series

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[1] Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; section 16(a) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1612(a); section 165(b) of the Federal-Aid Highway Act of 1973, as amended, 23 U.S.C. § 142

(continued...)

of current DOT regulations present an interrelated, complicated set of obligations. Several Federal circuit courts have interpreted these statutes and rules. The President agrees with this Committee that additional legislation is needed to set the record straight. We must be careful, however, that our efforts clarify the picture, rather than adding to the confusion.

Our goal, and yours, is to ensure that persons with disabilities have access to adequate transportation in this country, and we support legislation that would focus our efforts on publicly funded transportation services. We recommend enactment of a bill that would, for the first time, guarantee that public bus systems in this country be accessible to persons with mobility impairments. Thus, legislation should require that all new public buses be accessible to persons with disabilities. The Secretary of Transportation should have the flexibility to relax this requirement for any municipality where accessible bus service would prove to be impractical. For instance, in localities with extremely inclement climates where wheelchair lifts do not function for much of the year, it may be more practical to provide accessible paratransit service. Because the average life of a bus is 12 years, accessible bus transportation would become a reality in this country in a relatively short period of time, except for the cases where accessible buses are ineffective. As with other sections of S. 933 that involve state

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[1] (...continued) note; and section 317(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 1612(d).

and local government services, my experience as a Governor teaches me that it will be important to get input from the affected officials and people with disabilities from around the country before finalizing these provisions.

In addition, legislation should also require paratransit services that supplement, rather than duplicate, the fixed-route bus service. Ideally, paratransit service should be aimed at those severely disabled persons who are unable to use mainline accessible transportation.

Again, we should recognize the cost implications of these requirements. In the public transportation area, a considerable percentage of the capital costs of public transit authorities is borne by the Federal Government. It is unlikely, given existing fiscal constraints, that any substantial amount of new monies will be available in the Federal budget for transportation. Thus, these increased costs for accessibility must be carried out with already planned outlays. Given these fiscal constraints, we think some reasonable limitation on paratransit service costs may be appropriate and we are prepared to discuss with the Committee the level for such a limit.

On another matter, the Administration agrees that a comprehensive bill should address the issue of making our Nation's telecommunications system accessible to deaf persons. The inability to communicate by telephone renders the routine tasks of daily living -- such as making a doctor's appointment or inquiring about a job opportunity -- difficult or even impossible to accomplish. Establishment of a telecommunications relay service is clearly a vital step toward full integration of deaf persons into the mainstream. Legislation addressing this issue, though, should take into account the ongoing Federal Communications Commission inquiry mandated by the Telecommunications Accessibility Enhancement Act,[2] and preserve the maximum degree of freedom for the FCC to use its expertise in determining which specific requirements will result in the most efficient and cost-effective system.

Because S. 933 uses existing civil rights laws for minorities and women as its model, the remedies under this bill should parallel these existing laws. For example, the enforcement procedures and remedies now available under title VII of the Civil Rights Act of 1964 should be used for violations of discrimination based on disability in the employment area; and title II's enforcement scheme should be available to redress discrimination based on disability in places of public accommodation. This approach is fair and easy to implement. It would provide persons with disabilities with a full array of remedies, including preventive relief and reimbursement for out-of-pocket expenses, including backpay. In addition, use of enforcement mechanisms already in existence should ease enforcement and eliminate inconsistencies and confusion among those who have to comply with the law.

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[2] Pub. L. No. 100-542, 102 Stat. 2721 (1988).

I have witnessed the many faces of discrimination confronting persons with disabilities. As noted, over 36 million people in this country are disabled by reason of some physical or mental handicapping condition. The mere existence of these handicapping conditions does not for many of these individuals prevent them from interacting freely with others in society, or from performing the tasks that others perform on a daily basis. But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society--notions that have, in large measure, been created by ignorance and maintained by fear.

It is precisely these sorts of antiquated attitudes that have blocked people with disabilities from entering the mainstream of American life. Certainly attitudinal changes cannot be simply commanded or even legislated out of existence. No particular court order or single piece of legislation can alone change longstanding perception or misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process is to increase contact between and among people with disabilities and their able-bodied peers. And an essential component of that effort is the development of a comprehensive set of laws supported by a helpful set of regulations that all work together to promote the integration of people with disabilities into our communities, schools, and work places.

Mr. Chairman, the "Americans with Disabilities Act" can be the vehicle that brings persons with disabilities into the mainstream of American life. On behalf of President Bush, I pledge to this Committee and to the Congress our full support for comprehensive civil rights legislation for persons with disabilities.

We have an historic opportunity to move this legislation expeditiously through the Congress given the broad support for its purpose. Administration representatives are prepared to begin the task immediately of meeting with your respective staffs and those of other principals, such as Senator Dole, to work in good faith towards a consensus of all the issues. During this process, meetings at the principal level would also be beneficial in resolving any major policy questions that arise.

In that spirit, I would urge that the Committee not let an artificial deadline, such as a mark-up, stand in the way of completing this crucial task. I see no reason why a productive effort could not result in such a consensus within a relatively short period. Faced with the opportunity of enacting landmark legislation, a few more days of careful work would be time well spent in my view.

Thank you for this opportunity to testify. The Administration looks forward to working constructively with you on this enormously important piece of legislation.

TESTIMONY OF THE HONORABLE LOWELL WEICKER, JR.
TO THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
REGARDING THE AMERICANS WITH DISABILITIES ACT

JUNE 22, 1989

I COME BEFORE YOU TODAY AS A PARENT OF A CHILD WITH A DISABILITY, AS A FORMER CHAIRMAN OF THE SUBCOMMITTEE ON THE HANDICAPPED, AND NOW AS PRESIDENT OF A COALITION FURTHERING MEDICAL RESEARCH, TO DISCUSS LEGISLATION WHICH I BELIEVE SHOULD BE THE HIGHEST PRIORITY OF THE 101ST CONGRESS: THE AMERICANS WITH DISABILITIES ACT.

THE 43 MILLION AMERICANS WITH DISABILITIES HAVE WAITED LONG ENOUGH TO BE EQUAL IN THE EYES OF THE LAWS OF THE UNITED STATES.

FOR YEARS THIS COUNTRY HAS MAINTAINED A PUBLIC POLICY OF PROTECTIONISM TOWARD PEOPLE WITH DISABILITIES. WE HAVE CREATED MONOLITHS OF ISOLATED CARE IN INSTITUTIONS AND IN SEGREGATED EDUCATIONAL SETTINGS. IT IS THAT ISOLATION AND SEGREGATION THAT HAS BECOME THE BASIS OF THE DISCRIMINATION FACED BY MANY DISABLED PEOPLE TODAY. SEPARATE IS NOT EQUAL. IT WASN'T FOR BLACKS; IT ISN'T FOR THE DISABLED.

IT IS TRUE THAT, OVER THE LAST 16 YEARS, WE HAVE BEGUN TO ALTER THE DIRECTION OF PUBLIC POLICY. WITH THE ENACTMENT OF SEC. 504 OF THE REHABILITATION ACT OF 1973, CONGRESS SAID THAT NO LONGER WILL FEDERAL FUNDS SUPPORT OR ASSIST DISCRIMINATION, AND LAST YEAR WE REAFFIRMED THAT COMMITMENT IN THE CIVIL RIGHTS RESTORATION ACT. IN 1975, WITH THE PASSAGE OF PUBLIC LAW 94-142, WE SAID THAT CHILDREN WITH DISABILITIES HAD A RIGHT TO A PUBLIC EDUCATION--AND THAT NO LONGER WOULD WE ALLOW SUCH CHILDREN TO BE EDUCATED OUTSIDE OF THE MAINSTREAM OF OUR SOCIETY. THAT DIRECTIVE WAS EXPANDED IN 1986 BY PUBLIC LAW 99-457. MOST RECENTLY, IN THE FAIR HOUSING AMENDMENTS OF 1988, WE SAID THAT NO LONGER WILL WE BUILD MULTIFAMILY HOUSING THAT DOES NOT ALLOW ALL AMERICANS INSIDE.

THE LEGISLATION BEFORE THIS COMMITTEE TODAY COMPLETES THE WORK BEGUN IN 1973 TO SECURE THE CIVIL RIGHTS OF AMERICANS WITH DISABILITIES. IT PROVIDES A PLACE IN SOCIETY FOR EVERYONE. IT DOES NOT GUARANTEE YOU A JOB--IT GUARANTEES THAT YOU WILL NOT BE DENIED A JOB ON THE BASIS OF YOUR DISABILITY. THIS BILL LOOKS TO THE FUTURE, NOT TO PUNISHING SOCIETY FOR THE SINS OF THE PAST. IT LAYS OUT A CLEAR BLUEPRINT FOR THE FUTURE--A BLUEPRINT THAT SAYS, WHEN A COMMUNITY BUYS A NEW BUS, IT BUYS A BUS THAT EVERYONE CAN USE. A BLUEPRINT THAT SAYS, WHEN NEW BUILDINGS ARE

CONSTRUCTED, THEY MUST BE USABLE BY PERSONS WITH DISABILITIES. A BLUEPRINT THAT SAYS OUR PHONE SYSTEM MUST BE USABLE BY EVERYONE.

I'D LIKE TO TAKE A MOMENT TO REMIND THE MEMBERS OF THIS COMMITTEE THAT THE AMERICANS WITH DISABILITIES ACT WOULD NOT BE BEFORE YOU TODAY WERE IT NOT FOR THE WORK OF THE NATIONAL COUNCIL ON DISABILITY. THE MEMBERS OF THAT COUNCIL ARE PRESIDENTIAL APPOINTEES--AND ALL WERE APPOINTEES OF RONALD REAGAN WHEN THEY DEVELOPED THIS HISTORIC LEGISLATION. FROM JUSTIN DART, A LONG-TIME STALWART OF THE REPUBLICAN PARTY, TO JEREMIAH MILBANK, THE FOUNDER OF THE EAGLE FORUM, I DARE SAY NO ONE HAS EVER CHALLENGED THE CONSERVATIVE POLITICAL CREDENTIALS OF ANY OF THOSE 15 MEMBERS. AND, AFTER MUCH INTERNAL DELIBERATION, THEY CAME FORWARD WITH A BILL THAT WAS ONE OF THE MOST PROGRESSIVE, COMPREHENSIVE CIVIL RIGHTS LEGISLATION SINCE THE CIVIL RIGHTS ACT OF 1964. WHEN THEIR WORK WAS COMPLETED, THEY CAME AND ASKED, AS THE RANKING REPUBLICAN ON THE HANDICAPPED SUBCOMMITTEE, IF I WOULD BE THE LEAD SPONSOR IN THE SENATE. I SAID I WOULD BE PROUD TO DO SO.

YET AS ONE WHO KNEW THE DIFFICULTY OF FURTHERING ANY NEW LEGISLATION, MUCH LESS LEGISLATION FOR PERSONS WITH DISABILITIES, I KNEW THAT NOTHING WOULD BE ACCOMPLISHED EXCEPT ON A BIPARTISAN BASIS. AND SO IN THE NEXT BREATH, I ASKED THEM TO SEE TOM

HARKIN. NOT BECAUSE HE IS A GOOD FRIEND AND A COMPASSIONATE MAN, BUT BECAUSE AS THE CHAIRMAN OF THE HANDICAPPED SUBCOMMITTEE, HIS ACTIVE LEADERSHIP WAS CRITICAL TO THE FUTURE OF THE AMERICANS WITH DISABILITIES ACT. TOGETHER, WE COULD DO MUCH--SEPARATELY, NOTHING.

THE FACT IS, DISABILITY LEGISLATION HAS ALWAYS BEEN A BIPARTISAN EFFORT. AND NO ONE KNOWS IT BETTER THAN THE MEMBERS OF THIS COMMITTEE. THERE WASN'T A BILL THAT CAME THROUGH THIS COMMITTEE IN MY MEMORY THAT WASN'T COSPONSORED AND FULLY SUPPORTED BY THE CHAIRMEN AND RANKING MEMBERS OF THE FULL COMMITTEE, AS WELL AS THE HANDICAPPED SUBCOMMITTEE. EVERY ONE OF THOSE BILLS PASSED THIS COMMITTEE UNANIMOUSLY, AND EVERY ONE OF THOSE BILLS WAS SIGNED INTO LAW.

TODAY, THE BIPARTISANSHIP ON THIS BILL CONTINUES, WITH 11 REPUBLICANS FROM ALL RANGES OF THE POLITICAL SPECTRUM JOINING IN THE BATTLE. I CANNOT EMPHASIZE ENOUGH THAT THE DIVISIVENESS OF PARTISANSHIP HAS NO PLACE ON A BILL THAT WILL GUARANTEE THE CIVIL RIGHTS OF AMERICANS WITH DISABILITIES.

NOT ONLY IS THIS BILL THE APPROPRIATE HUMANITARIAN STEP FOR THE 101ST CONGRESS, THE AMERICANS WITH DISABILITIES ACT MAKES GOOD ECONOMIC SENSE AS WELL. RIGHT NOW, WE HAVE A SYSTEM THAT IS

BASED ON DEPENDENCE, WITH OVER $57 BILLION A YEAR IN FEDERAL FUNDS GOING FOR SOCIAL INSURANCE BENEFITS FOR DISABLED PERSONS. THE ECONOMIC RETURN TO SOCIETY WHEN PEOPLE GET OFF THE WELFARE ROLLS AND BECOME EMPLOYED CANNOT BE OVERSTATED. WITH TWO-THIRDS OF DISABLED AMERICANS UNEMPLOYED, AND 82 PERCENT OF THOSE PERSONS WILLING TO GIVE UP BENEFITS IF THEY COULD WORK FULL-TIME, IT CAN ONLY MEAN A REDUCTION IN WELFARE DEPENDENCY IF THOSE PERSONS HAVE REAL OPPORTUNITIES TO PARTICIPATE IN THE WORKFORCE.

I UNDERSTAND THE NEED FOR COMPROMISE, AND I COMMEND THE CHIEF SPONSOR, SENATOR HARKIN, AND THE CHAIRMAN OF THE FULL COMMITTEE, SENATOR KENNEDY, AND THE SUBCOMMITTEE RANKING MEMBER, SENATOR DURENBERGER, FOR WORKING WITH THOSE WHO HAVE EXPRESSED LEGITIMATE CONCERNS ABOUT THE BILL IN AN EFFORT TO COME UP WITH EQUITABLE, WORKABLE SOLUTIONS TO SOME OF THE ISSUES RAISED. I HAVE TO TELL YOU, THOUGH, THAT I THINK THE CHANGES MADE ON THIS LEGISLATION GO FAR ENOUGH. THE BALANCE HAS BEEN STRUCK--WHILE FINE-TUNING MAY BE NECESSARY, ANY FURTHER SUBSTANTIVE CHANGES WOULD, I BELIEVE, SERIOUSLY TILT THE SCALES AGAINST SECURING FULL CIVIL RIGHTS FOR PERSONS WITH DISABILITIES, AND THUS DEMEAN THE CONSTITUTIONAL SPIRIT IN WHICH THIS ENDEAVOR WAS CONCEIVED.

THE FACT IS, THIS LEGISLATION NOW ENJOYS SUPPORT FROM EVERY SEGMENT OF THE DISABILITY COMMUNITY. FROM THE DEAF AND HEARING

IMPAIRED, TO PERSONS INFECTED WITH HIV, TO THOSE WITH PHYSICAL AND MENTAL DISABILITIES, THERE IS NOTHING LESS THAN ENTHUSIASTIC SUPPORT FOR THIS BILL. OVER 100 ORGANIZATIONS HAVE BEEN WORKING TIRELESSLY ON BEHALF OF AMERICANS WITH DISABILITIES. DON'T FRUSTRATE THEM NOW. THEIRS HAS ALREADY BEEN A LIFETIME SPENT OVERCOMING NOT WHAT GOD WROUGHT BUT WHAT MAN IMPOSED BY CUSTOM AND LAW.

AS MOST OF YOU KNOW, I HAVE A SON WITH DOWN'S SYNDROME. SONNY IS 11 YEARS OLD. THANKS TO THE VISION OF YOU AND YOUR PREDECESSORS, HE HAS SPENT HIS LIFE IN PUBLIC SCHOOLS WITH NONDISABLED PEERS. WHEN SONNY COMPLETES SCHOOL, HE WILL GO OUT INTO THE WORLD READY TO TAKE HIS PLACE IN SOCIETY, ALONG WITH EVERYONE ELSE. THIS BILL THEN IS THE FOLLOW-ON TO SONNY'S FUTURE: WITH IT, HE WILL BE ABLE TO LIVE WHERE HE WANTS, GET ON A BUS, GO TO WORK WHEREVER HIS TALENTS WILL TAKE HIM, AND RELAXATION WILL MEAN MOVIES AND RESTAURANTS AS FOR ANYONE ELSE. WITHOUT ADA, HIS ABILITY TO DO ANY OF THOSE ACTIVITIES WILL REST ON THE WHIM OF SOCIETY. THAT SIMPLY ISN'T GOOD ENOUGH IN AMERICA.

DISABLED PERSONS MAY REPRESENT A MINORITY IN THIS COUNTRY, BUT THEY ARE A MINORITY ANY OF US MAY JOIN AT ANY TIME. INDEED, THE LATEST RESEARCH INDICATES THAT SONNY WILL PROBABLY JOIN THE

DISABLED RANKS FOR A SECOND TIME. AS REPORTED IN THE NEW ENGLAND JOURNAL OF MEDICINE THIS MONTH, DOWNS PERSONS ARE AT GREATER RISK TO DEVELOP ALZHEIMERS' BY AGE 50. THAT GIVES ME 39 YEARS TO FIND THROUGH RESEARCH A RESOLUTION OF THE FATE THAT AWAITS HIM.

HOWEVER, IN A MATTER OF MONTHS YOU CAN SECURE TO SONNY AND HIS 43 MILLION PEERS A HAPPINESS THAT ONLY COMES WITH LOVE EQUALLY DEVISED AND ADMINISTERED.

THANK YOU.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Deputy Assistant Attorney General

Washington, D.C. 20530

JUL 13 1989

Honorable Dan Coats
Senate Committee on Labor and
Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Coats:

Enclosed are the written responses to your follow up questions for the Attorney General of June 27, 1989 on S. 933, the Americans with Disabilities Act of 1989, submitted after the June 22, 1989 hearing.

If we can be of any further assistance, please feel free to contact our office.

Sincerely,

John P Mackey

John P. Mackey
Deputy Assistant Attorney General

Enclosure

cc: Honorable Edward M. Kennedy
Chairman
Senate Committee on Labor and
Human Resources

Honorable Orrin Hatch
Ranking Minority Member

✓ Honorable Tom Harkin
Chairman
Senate Subcommittee on the
Handicapped

1. **IN YOUR OPINION, DOESN'T THIS LEGISLATION REQUIRE EMPLOYERS TO MAKE DIFFICULT, IF NOT IMPOSSIBLE, DETERMINATIONS REGARDING THE IMMEDIATE DANGERS POSED BY AN INDIVIDUAL'S DRUG USE, IN THE FACE OF OVERWHELMING EVIDENCE THAT DRUG USE IN THE WORKPLACE IS INHERENTLY DANGEROUS?**

A: Any new bill must reaffirm this Administration's commitment to the eradication of illegal drug use. It must make clear that those who use illegal drugs and those who have been convicted of trafficking in illegal drugs are not to be included within the protections of this civil rights statute because of their illegal drug use.

As currently drafted, the proposed Americans with Disabilities Act would permit an employer to deny employment to an individual only if his or her current use of drugs or alcohol posed a direct threat to property or the safety of others in the workplace and the screening standard was "necessary and substantially related" to the "essential" component of the jobs." Thus, under the ADA, job-relatedness alone would not be an adequate basis for sanctioning drug or alcohol use. The employer would also have to establish direct threat. Also, the ADA job-relatedness standard is considerably more restrictive than the current Sec. 504 standard in the employment context, which is simply whether it interferes with an employee's ability to perform the duties of the job. It is probable that certain types of illegal drug use could not be excluded from the workplace under this standard, or only excluded after litigation on a case by case basis. Requiring an employer to meet the ADA standard on a case by case basis is unrealistic. In addition, it is inconsistent with the requirements of the Drug-Free Workplace Act of 1988, which specifically requires government contractors and grantees to take personnel action against employees convicted of drug use while on the workplace. The Drug-Free Workplace Act requirements apply regardless whether the illegal drug in question could be proven to pose a direct threat to property or the safety of others.

For users of legal drugs, the longstanding requirements under section 504 that mandate an assessment of whether a drug user endangers the property or safety of others or is unable to meet job requirements have not proven to be unworkable and should be extended to those covered by the ADA.

2. UNDER SECTION 202, THE ADA PLACES RESTRICTIONS ON TESTS THAT "TEND TO IDENTIFY" QUALIFIED INDIVIDUALS WITH DISABILITIES (SUBSECTION (b)(3)).

DOESN'T THIS LANGUAGE, TAKEN TOGETHER WITH THE LANGUAGE IN SECTION 101(b), RESTRICT THE PRACTICE OF MANY EMPLOYERS TO USE DRUG SCREENING OF EMPLOYEES OR PROSPECTIVE EMPLOYEES? AN INDIVIDUAL SCREENED OUT BY SUCH TESTING COULD CHALLENGE THE EXCLUSION UNLESS THE EMPLOYER COULD PROVE THAT THE EXCLUSION IS NECESSARY AND SUBSTANTIALLY RELATED TO THE ABILITY OF AN INDIVIDUAL TO PERFORM THE ESSENTIAL FUNCTIONS OF A PARTICULAR JOB.

A: The proposed ADA, as currently drafted, could interfere with employers' drug screening programs and bar their use as a condition of employment. It is difficult to see how drug testing could survive the broad prohibition in the proposed ADA against any test which "tends" to identify qualified individuals with disabilities. For example, under the ADA, an employer would have to show that drug tests were "necessary and substantially related to the ability of an individual to perform . . . the essential components of . . . [the] job." (Emphasis added) This would be a difficult standard to meet, and would likely be litigated on a case by case basis. It is possible that drug screening for certain illegal drugs, e.g., marijuana, would not meet the "necessary and substantially related" test. Therefore, the Administration proposes that the ADA be revised to make clear that users of illegal drugs and drug traffickers are not protected disabled persons and that users of legal drugs are not protected -- and thus -- may be tested and penalized if their use endangers the property or safety of others or interferes with their ability to meet job or program requirements, that is, applying the current Sec. 504 employment standard. Drug screening programs under current Federal law and procedures must provide an opportunity for the affected employee to explain or challenge any positive test result. If the individual establishes that the positive result was caused by a legally used prescription medication, it cannot be used as a basis for an adverse action against the employee unless the use prevents him from meeting job qualifications or causes a direct threat to the property or safety of others. Under the Administration s approach, no protection would be provided to persons whose use of illegal drugs is confirmed.

3. **ISN'T THE ADA IN CONFLICT WITH THE RESPONSIBILITIES OF EMPLOYERS UNDER THE DRUG-FREE WORKPLACE ACT OF 1988? THAT LAW REQUIRES GOVERNMENT CONTRACTORS TO CERTIFY THAT THEY ARE MAINTAINING A DRUG-FREE WORKPLACE, OR BE DEBARRED FROM FUTURE GOVERNMENT CONTRACTS FOR UP TO FIVE YEARS. THE ADA SEEMS TO SAY THAT A CONTRACTOR WHO BECOMES AWARE OF AN EMPLOYEE'S DRUG USE CAN TAKE NO ACTION TO REMOVE HIM OR HER FROM THE JOB UNLESS THE EMPLOYER CAN SHOW THAT THE EMPLOYEE POSES A DIRECT THREAT TO OTHERS IN THE WORKPLACE.**

A: The Drug-Free Workplace Act of 1988 applies only to the illegal use of drugs in the workplace (i.e., the "unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance") and requires that government contractors and grantees take appropriate personnel action -- up to and including termination -- against any employee convicted of a violation of any criminal drug statute. We would insist that any legislation distinguish between legal and illegal drug use in order to permit exclusion of illegal drug users. Therefore, any legislation that we would support would not conflict with the Drug-Free Workplace Act.

The Administration's proposal -- unlike the ADA -- would permit exclusion of an employee if his legal drug use interfered with his ability to perform the job or posed a threat to the property or safety of others. It would provide no protection for users of illegal drugs.

4. **I AM CONCERNED BY THE ABILITY OF GOVERNMENT TO END THE DEMAND FOR ILLEGAL DRUGS IN THE WORKPLACE, IN SCHOOLS, IN PUBLIC HOUSING, AND ELSEWHERE. DOESN'T EXISTING LAW -- *I.E.*, THE REHABILITATION ACT OF 1973, UNDER SECTION 504, WHICH OUTLAWS DISCRIMINATION BY FEDERAL GRANTEES AGAINST "HANDICAPPED INDIVIDUALS" -- POSE A PROBLEM BECAUSE THE LAW HAS BEEN INTERPRETED TO INCLUDE DRUG AND ALCOHOL ABUSERS AMONG THE "HANDICAPPED," SO THAT IT IMPAIRS THE ABILITY OF LOCAL SCHOOL BOARDS WHO TRY TO EXPEL DRUG-ABUSING STUDENTS OR PUBLIC HOUSING AUTHORITIES WHO TRY TO EVICT TENANTS WHO ARE DRUG OFFENDERS? WOULDN'T THE LANGUAGE OF THE ADA MAKE THE PROBLEM EVEN WORSE?**

A: As you note, under Section 504 drug and alcohol abusers are considered "handicapped" except in the employment context, where they are excluded from Sec. 504 protections if their current use endangers the property or safety of others or interferes with their ability to perform their job duties. The Administration believes persons who use illegal drugs, or who have been convicted of drug trafficking, should be excluded from all of the civil rights statutes that offer protection to individuals with disabilities. Under current law, it is our understanding that school districts may expel drug abusing students who endanger their classmates and disrupt their school programs and that public housing authority may evict tenants who are drug offenders. Any ADA-type legislation that the Administration would support

would permit adverse actions against employees or program participants based upon legal (in appropriate circumstances) or illegal drug use. Under the Administration's approach, those who use or are addicted to alcohol or other legal drugs would be protected by the antidiscrimination law unless use or addiction made them unable to perform their jobs or participate in the program or endangered the safety or property of others. This is the current Sec. 504 employment standard.

5. **I HAVE INTRODUCED LEGISLATION TO AMEND THE REHABILITATION ACT BY EXCLUDING DRUG AND ALCOHOL USERS FROM THE DEFINITION OF "HANDICAPPED INDIVIDUALS." A COPY OF MY BILL IS ATTACHED, FOR YOUR INFORMATION. IN YOUR OPINION, WOULD THIS HELP TO REMEDY THE PROBLEM?**

   A. **IF S.956 WERE AMENDED TO APPLY ONLY TO ABUSERS OF ALCOHOL AND USERS OF ILLEGAL DRUGS, WOULD THAT REMEDY THE PROBLEM?**
   B. **IF S.956 WERE AMENDED TO EXCLUDE ALL REFERENCES TO ALCOHOL USE SO THAT ONLY ILLEGAL DRUG USERS WOULD BE EXCLUDED FROM THE "HANDICAPPED," WOULD THAT BE PREFERABLE AS A REMEDY, IN THE DEPARTMENT'S VIEW?**
   C. **WHAT WOULD BE YOUR ANSWER IN AN INSTANCE WHERE THE DRUGS WERE LEGAL PRESCRIPTION DRUGS, BUT HAD BEEN OBTAINED BY THE USER THROUGH FRAUD OR THEFT? WHERE THE USER IS A CONSTRUCTION WORKER EMPLOYED BY A FEDERAL CONTRACTOR AT A BUILDING SITE, WHERE DRUG TESTING IS NOT ALLOWED AND WHERE EVEN A FEW DRINKS AT LUNCH COULD RESULT IN A LOSS OF QUALITY OR DANGER IN THE WORKPLACE?**

A: Any legislation must make clear that the definition of "handicap" does not include those who use illegal drugs, or those who have been convicted of drug trafficking, regardless of their current ability to meet job or program requirements. However, if a drug user experiences discrimination based on a handicapping condition unrelated to his or her drug use, that individual would be protected. Thus, the past use of illegal drugs could not be used as a pretext for actually discriminating against people who use wheelchairs or have other handicapping conditions.

On the other hand, the Administration believes that those who are addicted to alcohol or legal drugs should be subject to the current Rehabilitation Act standard applicable in the employment context, *i.e.*, they would be entitled to protections against discrimination, but only if their current use does not prevent them from meeting job qualifications (or program requirements) or cause a direct threat to property or the safety of others.

Having set out the principles that should be included in any legislation, let me add some caveats. We are concerned that we also not penalize children who are born addicted to legal or illegal substances by virtue of their mothers' addiction. For example, hospitals subject to nondiscrimination laws should not be allowed to refuse to treat those who are addicted at birth. And service providers should not be allowed to refuse services to those who are born with addiction but otherwise have not abused legal or illegal substances. We also do not wish to penalize those persons who, in limited cases, are using "controlled substances" such as marijuana or morphine under the supervision of medical professionals as part of a course of treatment, including, for example, experimental treatment or to relieve the side-effects of chemotherapy. These persons would fall under the same category as those who are users of legal drugs.

As to your final question, it is clear that "a few drinks at lunch" by a construction worker could cause a direct threat to property or safety and could prevent the drinker from performing his or her job adequately. It should be kept in mind that someone who drinks occasionally is not necessarily "handicapped"; that person may not be entitled to any protections under the law. But even if the person in your example were defined as handicapped by virtue of alcoholism, he or she could be removed from employment on the basis of threats to property or safety or inability to perform the job under the Administration's approach.

6. **THE CAPTAIN OF THE EXXON TANKER "VALDEZ" THAT SPILLED 100,000 GALLONS OF OIL INTO PRINCE WILLIAM SOUND IS, ACCORDING TO A REUTERS REPORT OF MAY 18, 1989 DATELINED ANCHORAGE, AN ALCOHOLIC WHO HAD GONE THROUGH A REHABILITATION PROGRAM. IF THE ADA HAD BEEN LAW, COULDN'T HE HAVE PREVENTED HIS REMOVAL FROM COMMAND THROUGH A SUIT UNDER SECTION 205 OF THE ACT?**

A: The ADA would prohibit discrimination in employment against any "qualified individual with a disability," and "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Because the safe operation of any tanker is an essential function of the position in question, alcohol use on the job would be legitimate grounds for removal, even assuming that the individual is included in the definition of "individual with a disability." Moreover, the ADA as written would allow employers to "requir[e] that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the workplace or program ...." Therefore, we believe in the situation you cite such an individual could be removed from his job.

7. **SECTION 603 WAIVES THE IMMUNITY OF THE STATES FROM SUIT UNDER THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. IS THIS A BACK-DOOR ATTEMPT TO CREATE A SUSPECT CLASS, I.E., THE DISABLED, WITHOUT ANY HEARINGS OR FORMAL CONGRESSIONAL FINDING? WHAT WILL BE THE EFFECT ON THE BACKLOG OF CASES IN THE FEDERAL COURTS?**

A: The ADA would establish a statutory prohibition of discrimination on the basis of disability by, inter alia, State and local governments. We do not interpret the Act to change relevant constitutional standards, and would review skeptically any proposal that it do so. There have been hearings on the ADA, and it is now being considered for enactment by Congress according to established procedures. We have expressed concern that the legislation should in all areas include remedies designed to avoid excessive burdens on the judicial system.

8. SECTION 205 PROVIDES FOR A PRIVATE RIGHT OF ACTION FOR "ANY INDIVIDUAL WHO BELIEVES THAT HE OR SHE IS BEING OR IS ABOUT TO BE SUBJECTED TO DISCRIMINATION ON THE BASIS OF DISABILITY ... (EMPHASIS SUPPLIED)." THIS PROVISION FOR ANTICIPATORY SUITS IS UNPRECEDENTED. WON'T THIS RESULT IN CLOGGING THE FEDERAL COURTS WITH VAGUE CLAIMS OF ANTICIPATED DISCRIMINATION? WHAT EFFECT WILL THIS HAVE ON THE CASE BACKLOG?

A: The provision for anticipatory suits arguably is not entirely unprecedented. The courts have long permitted preventive relief, in the form of injunctions and restraining orders to prevent future harm. However, entitlement to such relief hinges on establishing that the threat is real and not speculative, and that irreparable harm would result to the party seeking relief. Judicial interpretations of statues allowing such relief -- such as title II of the 1964 Act, which provides for suit whenever "there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited" by the title, 42 U.S.C. §2000a-3 (a); or the Fair Housing Act Amendments, which permit suit by an aggrieved person, including any person who "believes that such person will be injured by a discriminatory housing practice that is about to occur." § 802 (i) (2) -- have also been limited to instances where the threat is real and irreparable harm would occur.

There is no parallel provision in title VII of the Civil Rights Act of 1964, the statute that applies to employment discrimination. Thus, we believe that inclusion of the "about to be subjected to discrimination" language is inappropriate in the employment provisions of the ADA, and objectionable because it may be viewed as extending the right of action to circumstances where the threat is not real and there is not a showing of irreparable harm.

9. **HOW DOES A RECIPIENT OF FEDERAL FUND (SIC) WITH INTERESTS IN REAL ESTATE COMPLY WITH THE THREE DIFFERENT STANDARDS OF NON-DISCRIMINATION UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, THE FAIR HOUSING ACT (P.L. 100-430) AND THE ADA? IN RETROFITTING FACILITIES, WHAT CONSTRUCTION STANDARDS SHOULD A RECIPIENT FOLLOW -- THE UFAS STANDARDS REQUIRED BY SECTION 504 OF THE REHABILITATION ACT, THE ANSI STANDARDS REQUIRED BY THE FAIR HOUSING ACT OR THE STANDARD REQUIRED IN THE ADA?**

A: We agree that one of the critical requirements for new disabilities legislation is that it not confuse or apply, legal standards that are duplicative of or inconsistent with other legal requirements. It is our understanding that the ADA is not intended to cover housing other than hotels and motels, which generally would not be covered by the Fair Housing Act. (It would, however, as currently drafted, cover all other commercial structures in the U.S.) Even assuming that an existing facility could be covered by all three statutes, we would not expect a conflict. The Fair Housing Act does not establish requirements for retrofitting existing facilities; it instead requires landlords to allow tenants to make reasonable modifications, at their own expense, to the premises they occupy. (The ANSI standards apply to new construction under the FHA.) The Department of Housing and Urban Development's regulation implementing section 504 generally requires retrofitting -- structural alterations to existing housing facilities in conformance with UFAS, the Uniform Federal Accessibility Standards. The ADA also would require retrofitting, and require that such alterations conform to the guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board. Because UFAS is also required to be consistent with the minimum guidelines and requirements, there should be no conflict.

The Administration's position is that the ADA should not create duplicative and inconsistent standards and the Administration continues to have concerns about the ADA's retrofitting requirements.

10. **ASSUME THAT A PATIENT WITH A HISTORY OF VIOLENCE AND CHILD MOLESTATION IS RELEASED FROM A MENTAL INSTITUTION. AS SUCH HE IS CONSIDERED NOT TO BE A DIRECT THREAT TO THE SAFETY OF OTHERS. SHOULD HE THEN APPLY FOR A JOB AT A DAY CARE CENTER, WILL THIS FORMER MENTAL PATIENT BE AFFORDED RIGHTS TO EMPLOYMENT UNDER THE ADA? UNDER THE ADA, HOW DOES A DAY CARE CENTER ACT PRUDENTLY IF IT DOES NOT WISH TO HIRE A PERSON WITH THIS KIND OF BACKGROUND WITHOUT VIOLATING THE LAW?**

A: We do not read the ADA as requiring a day care center to hire a person who presents a significant risk to the health and safety of the children. In the employment context the ADA protects only "qualified" individuals, which means that protection is only provided to individuals who are capable of performing the essential functions of the job in question. If a person with a history of child molestation poses a significant risk, that person would not be "qualified" for a day care center job. The ADA would not require the center to hire that person. In each case, there must be an examination of the essential functions of the job in question and a determination of whether a particular individual is "qualified" for the job.

11. DOESN'T THE BROAD DEFINITION OF DISABILITY IN THE ADA IN EFFECT REPEAL THE PROVISION IN TITLE 18 OF THE U.S. CODE, SECTION 922(g) PROHIBITING A PERSON WHO HAS BEEN "ADJUDICATED AS A MENTAL DEFECTIVE OR WHO HAS BEEN COMMITTED TO A MENTAL INSTITUTION" FROM RECEIVING OR POSSESSING A FIREARM?

A: We do not read the ADA as having any effect on existing Federal criminal statutes. It therefore does not repeal any such statutes.

SUMMARY OF HEARINGS ON THE AMERICANS WITH DISABILITIES ACT PREPARED BY THE SENATE SUBCOMMITTEE ON THE HANDICAPPED

Hearings were held before the Labor and Human Resources Committee and the Labor and Human Resources' Subcommittee on the Handicapped on a bill to establish a clear and comprehensive prohibition of discrimination on the basis of disability on September 27, 1988, May 9, May 10, May 16 and June 22, 1989.

Several conclusions emerged from these hearings.

First, discrimination against people with disabilities remains pervasive in our society.

Second, people with disabilities are entitled to lead independent and productive lives, to make choices for themselves, and be integrated and mainstreamed into society. People with disabilities must be judged on the basis of their abilities and not on the basis of misperceptions, ignorance or irrational fears. These are inalienable civil rights.

Third, people with disabilities are entitled to meaningful access to all aspects of American society, which includes access not limited to places of employment, restaurants, and hotels, but also includes, among other establishments, doctors' offices, cleaners and shopping malls.

Fourth, in order to ensure independence, productivity, and integration into the community for people with disabilities, it is necessary to adopt comprehensive civil rights legislation. For example, transportation is the linchpin that ensures access to jobs, access to a social life, ability to go to restaurants and participate in community activities.

Fifth, it is not economically feasible to remove all architectural, communication, and transportation barriers in existing facilities, but improved access in existing facilities can be achieved. However, full accessibility in all new facilities must be achieved.

Sixth, rights without remedies are meaningless.

Seventh, the Americans with Disabilities Act balances the rights of people with disabilities with the legitimate concerns of the business community. The ADA does not create undue burdens on small businesses.

Eighth, the Americans with Disabilities Act is not only the right thing to do for people with disabilities but it is also the right way to help strengthen our economy and enhance our international competitiveness. The ADA will save the government and society billions of dollars by getting people off the dependency/ social welfare rolls and into jobs, into restaurants, into shopping centers, and into community activities.

On September 27, 1989, a joint hearing was held before the Subcommittee on the Handicapped and the House of Representatives' Subcommittee on Select Education on S. 2345, the Americans with Disabilities Act of 1988. Among the witnesses testifying were: Sandra Parrino, Chairperson, National Council on the Handicapped; Admiral James Watkins, Chairperson, President's Commission on the Human Immunodeficiency Virus Epidemic; Mary Linden, Morton Grove, Illinois; Dan Piper and Sylvia Piper, Ankeny, Iowa; Jade Calegory, Corona Del Mar, California; and Lakisha Griffin, Talladega, Alabama.

Also testifying were: Judith Heumann, World Institute on Disability, Berkeley, California; Gregory Hlibok, Washington, D.C.; Belinda Mason, Tobinsport, Indiana; and W Mitchell, Denver, Colorado.

David Saks, on behalf of the Organization for Use of the Telephone, Baltimore, Maryland, also provided testimony.

On May 9, 1989, the Committee on Labor and Human Resources held a hearing on S. 933, the Americans with Disabilities Act of 1989. This hearing examined discrimination on the basis of disability in general, and in the area of employment. Among the witnesses were: Tony Coelho, the Majority Whip of the House of Representatives; I. King Jordan, President of Gallaudet University, Washington, D.C.; Justin Dart on behalf of the Task Force on the Rights and Empowerment of Americans with Disabilities, Washington, D.C..

Also testifying were: Ms. Mary DeSapio, New York, New York; Joseph Danowsky, New York, New York; Amy Dimsdale, Arlington, Texas; Harold Russell, chairman, President's Committee on Employment of People with Disabilities, Washington, D.C.; Zachery Fasman, U.S. Chamber of Commerce, Washington, D.C.; Lawrence Lorber, American Society of Personnel Administrators, Washington, D.C.; and Arlene Mayerson, Disability Rights Education and Defense Fund, Berkeley, California.

Others providing testimony were: Barbara Hoffman, Vice President of the National Coalition for Cancer Survivorship; Robert McGlotten, Director, Department of Legislation, AFL-CIO; the Associated General Contractors of America; and the National Organizations Responding to AIDS.

On May 10, the Subcommittee on the Handicapped held a hearing on discrimination on the basis of disability in the areas of public accommodations and telecomunications. The Subcommittee heard testimony from Senator Bob Dole, Senator from Kansas and Senate Minority Leader; Perry Tillman, Paralyzed Veterans of America, New Orleans, Louisiana; Ken Tice, Advocating Change Together, Minneapolis, Minnesota, Lisa Carl and Vickie Franke, Tacoma, Washington.

Also testifying were: the Honorable Neil Hartigan, Attorney General of the State of Illinois; Ron Mace, Barrier Free Environments, Raleigh, North Carolina; William Ball, Association of Christian Schools International, Harrisburg, Pennsylvania; Sally Douglas, National Federation of Independent Business, Washington, D.C.; Malcolm Green, National Association of Theater Owners, Boston Massachusetts; and Bob Burgdorf, National Easter Seals Society, Washington, D.C.; Betty and Emory Corey, Baltimore, Maryland; and Ilene Foster, Baltimore, Maryland.

In addition, the Subcommittee heard testimony from Paul Taylor, National Technical Institute for the Deaf, Rochester, New York; Robert Yaeger, Minnesota Relay Service, Minneapolis, Minnesota; and Gerald Hines, AT&T, Basking Ridge, New Jersey.

Others providing testimony included: the American Civil Liberties Union; Peter Bradford, chairman of the State of New York Public Service Commission; and Paul Rodgers and Caroline Chambers on behalf of the National Association of Regulatory Utility Commissioners.

On May 16, the Subcommittee on the Handicapped's hearing examined discrimination on the basis of disability in transportation. Michael McIntyre, Queens Independent Living Center, Jamaica, New York; Mark Johnson, ADAPT, Alpharetta, Georgia; Laura Oftedahl, Columbia Lighthouse for the Blind, Washington, D.C.; Dr. Mary Lynn Fletcher, Director, Disability Services, Loudon County, Tennessee; testified before the Subcommittee.

Also testifying were: J. Roderick Burfield, Virginia Association of Public Transit Officials; Harold Jenkins, Cambria County Transit Authority, Johnstown, Pennsylvania; Dennis Louwerse, American Public Transit Association, Reading, Pennsylvania; Charles Webb, American Bus Association, Washington, D.C.; James Weisman, Eastern Paralyzed Veterans of America, New York, New York, and Tim Cook, National Disability Action Center, Washington, D.C.

Other providing testimony were: the Virginia Council for Independent Living; Wayne Smith, Executive Director of the United Bus Owners of America; and Theodore Knappen, Senior Vice President of Greyhound Lines, Inc.

On June 22, the Labor and Human Resources Committee heard testimony from Richard L. Thornburgh, Attorney General of the United States, and Senator Lowell P. Weicker, Jr, chief sponsor of the Americans with Disabilities Act of 1988.

In his testimony, General Thronburgh expressed the Administration's broad support for the Americans with Disabilities Act of 1989. He stated the Administration's hope that this legislation becomes a part of the board protections against discrimination which have been a part of American society since the passage of the Civil Rights Act of 1964.

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